Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE BRIAN BARNETT DUFF, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

v.

GOVERNOR OF THE STATE OF ILLINOIS, DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, and K.L., L.F. & R.B., on behalf of themselves and all persons similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, under 28 U.S.C. § 455(b)(1), a federal district judge must be disqualified if he obtains information about the case in off-the-record discussions with court-appointed experts, conducted with the consent of the parties.

(2) Whether, under this Court's decision in *Liteky v. United States*, 114 S. Ct. 1147 (1994), and 28 U.S.C. § 455(a), a federal district judge can be removed merely because "a reasonable observer would be seriously concerned about the court's ability to conduct the trial impartially," without a finding that the judge's alleged partiality would make a fair hearing or fair judgment impossible.

(3) Whether, under Federal Rule of Appellate Procedure 21, the District Court was denied a fair opportunity to respond to a petition for writ of mandamus where the Seventh Circuit ordered only the real parties in interest to file a response, failed to hold oral argument, and granted the petition without permitting the District Court to respond.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Honorable Brian Barnett Duff, United States District Judge for the Northern District of Illinois, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Seventh Circuit which granted a petition for a writ of mandamus brought by defendants Jim Edgar, Governor of the State of Illinois, and Ann Patla, Director of the Department of Mental Health and Development Disabilities, and issued a writ that removed the District Judge from the case and required its reassignment.

OPINIONS BELOW

The memorandum opinion of the District Court denying the defendant-respondents' motion for recusal, *K.L. v. Edgar*, No. 92 C 5722, slip op. (N.D. Ill. July 2, 1996), is unreported and enclosed in the Appendix. *See* App. 1-23. The opinion of the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"), which granted the petition and issued the writ of mandamus, *In re Edgar*, No. 96-2641 (7th Cir. July 18, 1996) (per curiam) (the "Opinion"), is reported at 93 F.3d 256, and is included in the Appendix. *See* App. 29-41. The Seventh Circuit's order denying rehearing and rehearing *en banc* is appended to the Opinion. *See* App. 41-42.

JURISDICTION

This Court has jurisdiction over the instant petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254. On July 18, 1996, the Seventh Circuit issued a writ

of mandamus pursuant to the All-Writs Act, 28 U.S.C. § 1651(a), and ordered the underlying action reassigned to another district judge. On August 1, 1996, petitioner filed a suggestion for rehearing *en banc*. The Seventh Circuit denied petitioner's suggestion for rehearing *en banc* on August 14, 1996.

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 445 and Rule 21 of the Federal Rules of Appellate Procedure.

Section 455 of the Judicial Code, 28 U.S.C. § 455, states in pertinent part:

> **§ 455. Disqualification of justice, judge, or magistrate.**
>
> **(a)** Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> **(b)** He shall also disqualify himself in any proceeding in the following circumstances:
>
> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> **(e)** No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Federal Rule of Appellate Procedure 21 states as follows:

> **(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing.** Application for a writ of mandamus or of prohibition directed to the judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the proscribed docket fee, the clerk shall docket the petition and submit it to the court.
>
> **(b) Denial; Order Directing Answer.** If the Court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument.

The proceeding shall be given preference over ordinary civil cases.

(c) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure proscribed in subdivisions (a) and (b) of this rule.

(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Fed. R. App. P. 21.

STATEMENT

In an extraordinary *per curiam* opinion, the Seventh Circuit granted a petition for a writ of mandamus that removed the petitioner, The Honorable Brian Barnett Duff, on the eve of trial, from a case over which he had presided for more than four years. The removal was based upon presumptions made and conclusions reached by the appellate court with respect to the District Judge's off-the-record meetings with experts he had appointed in the underlying case. After observing that whether Judge Duff's meeting with the court's experts "was a disqualifying event depends on what transpired," the panel below inferred from an agenda prepared by the experts that the meeting "touch[ed] the merits, or procedures affecting the merits." App. 31. Further concluding that the "information passed to the judge" during the meeting was

"personal knowledge of disputed evidentiary facts concerning the proceeding" within the meaning of § 455(b)(1), the Seventh Circuit held that disqualification was mandatory; even if the parties had consented to the meeting, they could not waive the objection.

However justified the Seventh Circuit panel below may have felt disqualification of the judge was supported by the facts, or more accurately, the presumptions it made and inferences it drew in the case before it, the decision will wreak havoc in the federal district courts. Among other things, the Opinion will interfere with a district court's discretion to utilize experts under Rule 706 of the Federal Rules of Evidence and to facilitate settlement under Rule 16(f) of the Federal Rules of Civil Procedure. Moreover, the Opinion interprets the disqualification command of § 455(a) in conflict with this Court's majority opinion in *Liteky v. United States*, 114 S. Ct. 1147 (1994), and adopts instead the standards Justice Kennedy advocated in his concurring opinion in that case.

Finally, in its zeal to find Judge Duff disqualified from hearing the case at hand, the court below deprived him of an adequate opportunity to respond to the mandamus petition.

The Seventh Circuit ruled precipitously; failing to adhere to Rule 21 of the Federal Rules of Appellate Procedure, the Seventh Circuit ruled without the benefit of hearing from Judge Duff in any fashion, and granted the petition just three days after the plaintiffs had filed their opposing response. The Seventh Circuit also ruled one day *before* the date on which the District Judge had requested leave to file his response, and did so without ruling on the request.

A. Proceedings Before The District Court.

On August 26, 1992, a plaintiff class of persons who are or will be institutionalized in mental health centers operated by the defendant state officials filed their complaint in this action seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. The complaint alleged that conditions and practices in the defendants' facilities violated and continue to violate the plaintiffs' constitutional rights to safety, freedom of movement, and adequate medical and psychiatric care and treatment.

Two weeks after they filed their complaint, plaintiffs moved pursuant to Federal Rule of Evidence 706 for the appointment of a panel of experts to evaluate their allegations that the defendants' practices. The plaintiffs' motion contended that a panel of court-appointed experts would be helpful in facilitating settlement. Plaintiffs-Respondents Response to Defendants-Petitioners' Petition for Writ of Mandamus, App. 169. Defendants agreed to the motion and, in the Spring of 1993, the plaintiffs and defendants nominated a panel of experts for the District Court's consideration. With the knowledge and consent of the defendants and the plaintiffs, Judge Duff conducted extensive *ex parte* interviews of the experts prior to their appointment. App. 171-72.

On November 10, 1993, the District Court entered an agreed order (the "Agreed Order") appointing a panel of three experts to "investigate the practices, programs and policies of the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) pertinent to conditions of care and treatment for mentally ill persons in the custody of twelve DMHDD facilities." App. 48-50. The

Agreed Order provided that the panel, upon completion of its investigation, would prepare a report that would explain whether, in their expert opinion, the treatment, practices and procedures of the DMHDD represented a "substantial departure from professionally accepted minimum standards, practices and judgments." App. 49.

The Agreed Order also appointed a nationally recognized law professor, Norval Morris, the Julius Kreeger Professor of Law & Criminology, Emeritus, of the University of Chicago Law School, to serve as the Manager of the expert panel. As the Panel Manager, Professor Morris was required to "coordinate and facilitate the investigation and reports of the Panel." App. 51. The Manager's duties also included "facilitat[ing] communications between Panel members, as requested, . . . and report[ing] to the Court and the parties as to the progress and status of the Panel's investigation." *Id.* The Agreed Order further noted that "[b]y appointing the Manager, the Court is not relinquishing its exclusive prerogative to instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report." *Id.*

The Panel engaged in an exhaustive effort lasting over two years, during which time each party expended hundreds of thousands of dollars. During this time, the expert panel met several times with counsel for both parties as well as with officials and personnel of the DMHDD. App. 176. During this same period, Professor Morris met several times with the District Judge to advise him of the status of the panel's efforts. All of these meetings were disclosed to the parties in monthly

reports, which also served to advise the District Judge and the parties on the progress of the panel's efforts. *See, e.g.*, App. 61-64. Copies of these reports were sent to all parties.

On August 10, 1994, the expert panel briefed the parties on their progress, outside the presence of the District Court. That meeting lasted "two and one half hours to discuss a wide variety of topics relevant to the litigation, including a briefing on the expert's progress *and their tentative, general findings thus far.*" Affidavit of Norval Morris, App. 44 (emphasis added). After that meeting, the panel and Professor Morris decided that a meeting with the District Court would be helpful, *see id.*, and in his monthly report sent to all parties, Professor Morris noted the expert panel's intention to conduct a "similar meeting" with the District Judge. *See* App. 62.

This meeting between the panel, Professor Morris and Judge Duff took place on **September 7, 1994**, and on **October 12, 1994** the substance of this meeting was disclosed to the parties in Professor Morris' monthly report. *See* App. 63-64. *Almost two years later*, and despite having been previously told of the intent to conduct a meeting of the panel with the District Judge "similar" to that held with the parties on August 10, the defendants filed their Petition for Writ of Mandamus and argued that this meeting was intended improperly to allow the District Judge an opportunity to preview the evidence he would hear at trial. The Affidavit of Professor Morris submitted in support of the District Judge's Suggestion for Rehearing *En Banc*, however, establishes that no such evidentiary preview occurred. Instead, Professor Morris swears under oath that:

> [a]t this meeting [of September 7, 1994, between the panel and the District Judge], there was no discussion of any substantive aspect of the experts' report other than what was disclosed to the parties in my correspondence of September 8, 1994. The meeting was not designed to provide the district court with an opportunity to "preview" the panel's conclusions or the merits of the case. ***Indeed, no person at this meeting raised or commented on the substance of potential testimony or the conduct of the litigation.***

App. 45 (emphasis added).

The panel issued its draft report in January, 1995, and its findings were not favorable to the defendants. Pursuant to the Agreed Order, the panel received written comments to the draft report from both parties through their counsel. The panel met with the parties to discuss those comments prior to the delivery of the final report. App. 179-80. While the panel completed its final report in June, 1995, in the interest of promoting settlement, it was not publicly released; in fact, both parties did not want the report released, and the Judge agreed.[1]

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[1] The opinions of the panel became a subject of interest among mental health advocacy groups who had followed the progress of the class action. In July 1995, one such group, the Mental Health Association of Illinois ("MHAI"), wrote to Judge Duff and explicitly asked that he make the report public. The MHAI also sent a copy of this letter to plaintiffs' counsel. The District Court responded to this letter, copying plaintiffs' counsel. Letter of The Honorable Brian Barnett Duff to Mr. John Day & Ms. Jan Holcomb of MHAI, App. 65. Judge Duff's letter to the MHAI defended the Governor of Illinois from the group's accusation that the Governor should have provided an official response to the report by that time. Noting that the advocacy

In June, 1996, shortly before the scheduled trial date, defendants filed a motion to recuse the District Judge, stay all proceedings, and continue the trial. App. 188. Defendants' motion accused Judge Duff of judicial bias and partiality, claimed that he had obtained personal knowledge of disputed evidentiary facts and, more ominously, accused Judge Duff of sitting at the center of a conspiratorial strategic alliance that consisted of plaintiffs' counsel, the court-appointed expert witnesses, and advocacy groups. App. 167-68. Despite these serious allegations, which the District Judge strongly denies, the defendants never articulated the precise parameters of the alleged conspiracy, how it worked, what it hoped to

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group's purpose was "political", Judge Duff firmly told the group that it should back off:

> The MHAI at this moment has no role, responsibility or rights in this litigation. The document itself when it was prepared with some of the state mental health officials was improperly given to them and they have been told not to publish it.

App. 66.

The District Court further expressed his disagreement with their view that immediate release of the report should be ordered:

> In due time, we hope to achieve some significant results. In the meantime, I disagree with your feeling that the public or anybody else is entitled to the publication of the expert panel report which is confidential and a working paper for the purpose of either assisting in the negotiation of a consent decree or for possible utilization during trial, if any.

Id.

accomplish, or a single corroborative fact of any agreement of the so-called conspirators. To bolster their accusations, defendants demanded the right to conduct extensive discovery, including taking the deposition of the District Judge, as well as his court personnel, and to examine the court's own notes and documents. Judge Duff denied defendants' motion for recusal in a memorandum opinion dated July 2, 1996. App. 1-23.

The next afternoon, July 3, 1996, after Judge Duff had left town for the Independence Day holiday, defendants filed their fifty-page Petition for Writ of Mandamus Disqualifying District Judge and Emergency Motion for Stay in the Seventh Circuit. App. 76-159.[2] While Rule 21 of the Federal Rules of Appellate Procedure requires appellate courts to order "respondents" to answer the petition by a date certain, one court day later, on July 5, 1996, the Seventh Circuit entered an order requiring only "real-parties-in-interest" to file their response to defendants' petition by Thursday, July 11, 1996. *See* App. 24. On July 8, 1996, plaintiffs filed a motion to extend for fourteen days the date to answer the petition and, after defendants objected, the Seventh Circuit entered an order extending the date for filing such responses until July 15, 1996. App. 25.

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[2] While defendants certified that on July 3, 1996, they served a complete copy of the petition and exhibits on the District Court, defendants in fact failed to do so during regular business hours. Instead, the petition and twenty inches of exhibits were left on the floor unidentified in the corridor outside the district court's chambers for the long holiday weekend.

On July 12, 1996, the District Judge filed an appearance in the Seventh Circuit and filed Respondent's Emergency Motion for Clarification and for Extension of Time for Filing Respondent's Brief. App. 26-28. The emergency motion asked the Appellate Court to clarify whether its July 5, 1996 and July 11, 1996 orders requiring "real-parties-in-interest" to answer the defendants' petition were intended to apply to the District Judge as well as to the plaintiffs. Judge Duff's motion further requested, if the Seventh Circuit's orders were intended to apply to him, that he be allowed until July 19, 1996 to file his response to the petition since he was on trial all day, every day, during this entire time period. Although defendants filed an objection to this motion, *the Seventh Circuit never ruled upon it.*

On July 18, 1996, the Appellate Court granted the petition, and issued a writ of mandamus that ordered the case reassigned to another district judge. It also held that the panel of experts was no longer entitled to "claim the mantle of judicial appointment," even though no party asked it to so rule. App. 40. By ruling with the speed it did, the Opinion preempted the response the District Judge had informed the Seventh Circuit he intended to file, and would have, just one day later, July 19, 1996.

B. The Opinion Below.

The Seventh Circuit's July 18, 1996 Opinion held that "personal knowledge of disputed evidentiary facts" within the meaning of 28 U.S.C. § 455(b)(1) is conferred upon a court by *any* communication that is not on the record nor fully subject to the tools of the adversary process. Such knowledge is "extrajudicial" and once obtained, recusal is required; the parties cannot consent

to *any* substantive *ex parte* communication, nor waive any objection to the district court's further participation in the case.

To support its conclusion that Judge Duff had in fact obtained "personal knowledge of disputed evidentiary facts," the Seventh Circuit adopted an extraordinary presumption: any uncertainty in the record would be construed against the District Judge and in favor of the demand for recusal, even though the Appellate Court preempted any response on these issues from the District Judge. The panel below ruled that the failure to allow the parties to discover his personal deliberations in the management of the case, amounted to an admission by the District Judge that the conversations of which the defendants had been aware for twenty-one months must have been substantive and improper. App. 31 ("To invoke a privilege is therefore to *confess* that the discussions covered the substance of potential testimony and the conduct of the litigation – *and if this is not so in fact, it is nonetheless what we must assume, because no evidence in the record undermines the inferences naturally to be drawn from the outline for the September 7 meeting.*") (emphasis added); *see also id.* ("We cannot know, because the district judge has blocked discovery from other participants and has declined to state on the record his own memories of what happened."); App. 34 ("What information passed to the judge, and how reliable it may have been, are now unknowable."). *But see infra* note 9 (citing to record below where Judge Duff disclosed his recollection of the September 7 meeting).

Having presumed that Judge Duff's communications with the expert panel were substantive, and that these conferred personal knowledge upon the District Court

within the meaning of § 455(b)(1), the Appellate Court went on to rule that any substantive knowledge about a case obtained by a district judge in an off-the-record proceeding is extrajudicial:

> The point of distinguishing between "personal knowledge" and knowledge gained in a judicial capacity is that information gathered from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." . . . Off-the-record briefings in chambers . . . leave no trace in the record – and in this case the judge has forbidden any attempt at reconstruction. What information passed to the judge, and how reliable it may have been, are now unknowable. *This is "personal" knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated.*

App. 34 (emphasis added).

The Seventh Circuit cited no support for these new definitions of "personal knowledge" and "extrajudicial" knowledge.

The Opinion below also concluded that disqualification of Judge Duff was indisputably required by § 455(a). In doing so, however, the Appellate Court ignored *Liteky*'s requirement that recusal under § 455(a) requires a finding that the alleged bias or partiality of the district judge made a fair trial impossible. The Seventh Circuit made no attempt at such a finding and, on the record presented, could not have done so.

Not content simply to remove the District Judge from the case, the Seventh Circuit went further and granted defendants relief they never requested. Without citing

any authority, the panel below ruled that "the panel can no longer claim the mantle of judicial appointment" and held that the panel members were no longer court-appointed experts. App. 40. Although leaving to the successor district judge the decision of whether to allow these witnesses to testify, the practical effect of the ruling was to prevent such judge from considering their opinions, and their work product. Indeed, even any admissions the defendants made in their interviews with the experts are now barred.[3]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Seventh Circuit's Opinion imposes a legacy of two new rules that *require* disqualification of a federal district court judge under 28 U.S.C. § 455. In particular, the Opinion holds that:

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[3] The district judge to whom this case is now assigned so read the decision and adopted the Seventh Circuit's credibility determinations. He has barred these experts from testifying as opinion witnesses and barred any use of their work and interviews, even by subsequent experts:

> I have looked over the Seventh Circuit's opinion, and as far as I am concerned, Leona Bachrach, Martha Knisley, and Dr. Okin, the panel of expert witnesses that Judge Duff appointed, I am going to discharge them. I am going to bar them from testifying in this case. It seemed to me the Seventh Circuit questioned their objectivity and their credibility, and they became advocates rather than expert witnesses. So the three of them are no longer going to be in this case, nor is either side going to be allowed to call them as expert witnesses.

Report of Proceedings Before the Honorable James H. Alesia at 6-7, App. 231.

(1) any information a federal judge learns that is not on the record, and "which can be neither accurately stated nor fully tested" nor controverted by the tools of the adversary process, constitutes "personal knowledge of disputed evidentiary facts" requiring disqualification under § 455(b)(1); and

(2) conduct of a judge that "would cause a reasonable observer to be seriously concerned about the court's ability to conduct the trial impartially" is sufficient to require disqualification under § 455(a), even though such conduct is not found "to make fair judgement impossible."

The first ruling of the Seventh Circuit conflicts with the decisions of other courts of appeal and makes improper, practices that judges throughout the federal system commonly follow. The second ruling squarely conflicts with this Court's holding in *Liteky v. United States*, 114 S. Ct. 1147 (1994), and adopts the position of Justice Kennedy in his concurring opinion in that case. Because of the great need for certainty in this area of the law throughout the federal system, this Court should grant *certiorari* to settle these issues.

I. THE OPINION'S NEW DEFINITION OF "PERSONAL KNOWLEDGE" UNDER 28 U.S.C. § 455(B)(1) CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS, WITH THE COMMON PRACTICE OF FEDERAL JUDGES EVERYWHERE, AND WITH CANON 3(A)(4) OF THE CODE OF JUDICIAL CONDUCT.

Without citation to authority, the Seventh Circuit has crafted a new rule expanding the meaning of "personal knowledge," as that term is used in 28 U.S.C. § 455(b)(1), to include information about a case learned by a district

judge in "[o]ff-the-record briefings in chambers . . . [that] leave no trace in the record," *even if the judge obtained this information with the consent of the parties*. The Appellate Court further held that the receipt of such information mandates recusal of the judge. App. 34-35. In so holding, the Opinion conflicts with decisions by other circuit courts of appeal and seriously jeopardizes the ability of district courts to use court-appointed experts and to facilitate settlements.

Unlike the Opinion below, other federal circuit courts have accorded the term "personal knowledge" its common evidentiary meaning, *e.g.*, "an impression derived from the exercise of his own senses, not from the reports of others – in other words, [personal knowledge] must be founded on personal observation." *See United States v. Evans*, 484 F.2d 1178, 1181 (2d Cir. 1973) (quoting 2 Wigmore, Evidence § 657 (3d ed. 1940)); *see also Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989) (report of expert witness did not constitute "personal knowledge" for purposes of summary judgment); Advisory Comm. Note, Fed. R. Evid. 602 ("personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception"); *cf. Laird v. Tatum*, 409 U.S. 824, 826-27, 93 S. Ct. 7, 9-10 (1972) (Rehnquist, J., in chambers opinion) (then-Justice Rehnquist concluding that his own expert testimony before Congress did not imbue him with personal knowledge of underlying facts because he was not a "material witness").

Numerous courts have held that a district judge cannot gain "personal knowledge of disputed evidentiary facts," as proscribed by § 455(b)(1), from discussions with a court-appointed expert; since such communications

arise in the course of judicial proceedings, they do not mandate recusal. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 184 (2d Cir. 1991) (information acquired by district court's *ex parte* discussions with court-appointed housing expert was acquired in "judicial capacity" and did not mandate recusal under § 455(b)(1)); *United States v. Phillips*, 664 F.2d 971, 1004 (5th Cir. 1981) (*ex parte* communications with prosecutor regarding threats to disrupt proceedings were "ancillary proceeding which were inseparable from [the] case"), *cert. denied*, 457 U.S. 1136 (1982); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1231, 1241 (D.N.M. 1990) (*ex parte* phone conversations with court-appointed expert "arise in a judicial context" and do not require recusal under § 455(a)); *Wolyn v. Livingston*, 1995 WL 685971 (No. 93 Civ. 0618 (TPG)) (S.D.N.Y. Nov. 16, 1995) (*ex parte* communications with court-appointed trustee, in which the trustee reported results of its investigation to the judge, are facts obtained in course of judicial duty and do not constitute personal knowledge under § 455(b)(1)).[4]

Disregarding these precedents, the Court below held that what the District Judge learned in the challenged meeting with his appointed experts was " 'personal knowledge' no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated." App. 34-35.

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[4] Conversely, a judge *does* obtain personal knowledge when he personally observes facts that are disputed in a case before him. *See, e.g., United States v. State of Alabama* 828 F.2d 1532, 1544-46 (11th Cir. 1987) (removing judge from case in which he was required to "make factual determinations about bills and legislative fights in which he played an active part" as former member of the legislature), *cert. denied*, 487 U.S. 1210 (1988).

Such a rule cannot and should not be the law. It would wreak havoc with the right to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." *In re Peterson*, 253 U.S. 300, 312, 40 S. Ct. 543, 547 (1920); *see also* Fed. R. Evid. 706. According to a recently conducted survey of federal judges, two-thirds of those responding reported that they had *ex parte* communications with experts appointed under Rule 706. *Reference Manual on Scientific Evidence*, Court Appointed Experts at 550 (Federal Judicial Center, 1994). In recognition of the usefulness that such communications have for district courts, the *Manual on Scientific Evidence* cautions that:

> A broad prohibition of ex parte communications between a judge and a court-appointed expert *would impede necessary communication when the expert is appointed to serve a technical advisor to the court* [footnote omitted], a role analogous to that of a judicial clerk.

Id. at 549 (emphasis added).

The Opinion below effectively bans *all ex parte* meetings of any consequence between a district judge and his or her appointed experts. As the panel held, "[w]hether the meeting was a disqualifying event depends on what transpired . . . Did any meeting between judge and experts touch the merits or procedures affecting the merits?" App. 31. By so framing the inquiry, the Opinion opens the door for every disappointed litigant to depose the district judge, as defendants here attempted, and literally to put the court on trial. Mandatory recusal

would follow.[5] A rule that would eliminate the common practice of federal judges everywhere to meet *ex parte* with their appointed experts should be promulgated only by this Court, which has yet to address the use of court-appointed experts under Rule 706 or pursuant to the inherent powers of the district court.

The mischief of the Seventh Circuit's Opinion cannot be confined to discussions with court-appointed experts. While the Opinion reasons only in that context, a logical consequence of the new rule would emphatically diminish a district court's ability to foster settlement. It is a common and encouraged practice for a judge to meet privately with each party during settlement discussions, which inevitably touch the merits of the dispute.[6] Canon 3A(4) of the Code of Judicial Conduct expressly acknowledges the right of a judge to engage in *ex parte* discussions to facilitate settlements:

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[5] The new Seventh Circuit rule will also have a chilling effect on an expert's willingness to accept appointment by the court. Why would an expert wish to devote his or her time to such projects when the expert could be dismissed upon the whim of a disappointed party, and where the expert could be labeled as having acted improperly for simply meeting with the appointing judge.

[6] The practical benefits of judicial involvement in settlements are noted in the *Manual for Complex Litigation* which suggests that parties may profitably employ "confidential discussions with judge," where the "judge can point out weaknesses without fear of compromising a party's position in the eyes of opposing counsel," and "may be able to suggest areas of possible agreement, *without revealing confidences.*" *Manual for Complex Litigation (Third)* § 23.13 (1995) (emphasis added).

> A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

114 S. Ct. at 327.

The Opinion, however, changes this practice. It allows a disappointed litigant, or one who is disappointed in settlement talks and now believes too much information was revealed to the court, to demand recusal of the judge.[7] If such a common practice in the federal courts is to be eliminated, it should only be through the authority of this Court. Because of the broad impact the Opinion below will have on the way in which district judges in the Seventh Circuit and elsewhere manage their cases, the petition should be granted.

II. IN CONFLICT WITH THIS COURT'S DECISION IN *LITEKY*, THE OPINION BELOW HOLDS THAT A DISTRICT COURT JUDGE CAN BE REMOVED UNDER § 455(A) WITHOUT A FINDING THAT FAIR JUDGMENT WOULD BE IMPOSSIBLE.

Although the Opinion found that removal of Judge Duff from the case was mandated principally by

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[7] The Opinion thus overrules decisions like *Geneva Assurance Syndicate Inc. v. Medical Emergency Servs. Assocs.*, 1993 U.S. Dist. LEXIS 13525 (N.D. Ill. Sept. 27, 1993), where the district court denied a motion for recusal under § 455(b)(1) based on the court's alleged "personal knowledge" obtained from participating in over twenty settlement conferences over a year long period, with the consent of the parties. The Opinion would undermine, if not eliminate, a district court's general authority to work with parties to settle cases. *See, e.g., G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 651-53 (7th Cir. 1989).

§ 455(b)(1), and perhaps concerned that its unprecedented definition of "personal" and "extrajudicial" knowledge might not pass muster, the panel also expressed its belief "that disqualification is independently required by 28 U.S.C. § 455(a)." App. 35. In so holding, and *without finding* that the District Judge "display[ed] deep-seated favoritism or antagonism that would make fair judgment impossible," the panel neglected to follow this Court's ruling in *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994). Instead, the Opinion adopted the approach advocated by the concurring opinion of Justice Kennedy, *see id.* at 1159, that the "impossibility of fair judgment" standard be discarded. This, in turn, creates an irreconcilable conflict with the decisions of other circuit courts of appeal as well as with this Court's decision.

This Court's majority opinion in *Liteky* teaches that the key inquiry of recusal under § 455(a) is whether a fair trial is impossible. In particular, whether it involves either "opinions formed by the judge on the basis of . . . events occurring in the course of the current proceedings," judicial remarks, or *both*, such opinions or remarks must "display a deep-seated favoritism or antagonism that would make fair judgment impossible." 114 S. Ct. at 1157. In his concurring opinion, Justice Kennedy disagreed with this standard:

> The Court's "impossibility of fair judgment" test bears little resemblance to the objective standard Congress adopted in § 455(a): whether a judge's "impartiality might reasonably be questioned." . . .
>
> . . . .

> . . . [I]t seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake.

Id. at 1161-62.

In adopting the "impossibility" test, this Court chose *not* to adopt Justice Kennedy's formulation. Numerous circuit courts properly have followed *Liteky*'s majority holding that a district judge may be recused under § 455(a) only when there is a finding that an objective observer would conclude that fair judgment is impossible. *See Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550, 557 (Fed. Cir. 1996) (recusal on basis of judicial conduct under § 455(a) requires finding that, under an objective standard, fair judgment would be impossible), *petition for cert. filed* August 20, 1996 (No. 96-287); *Groden v. Random House, Inc.*, 61 F.3d 1045, 1053 (2d Cir. 1995) (alleged bias originating from judicial source requires finding that fair judgment would be impossible); *United States v. Antar*, 53 F.3d 568, 574 (3d Cir. 1995) (section 455(a) mandates objective inquiry that fair judgment impossible when alleged bias stems "from facts gleaned during judicial proceedings themselves"); *United States v. Young*, 45 F.3d 1405, 1415 (10th Cir.) (same as *Groden*), *cert. denied*, 115 S. Ct. 2633 (1995); *In re Larson*, 43 F.3d 410, 413 (8th Cir. 1994) (same); *United States v. Chischilly*, 30 F.3d 1144, 1149 (9th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 946 (1995); *see also United States v. Jordon*, 49 F.3d 152, 155 n.3 (5th Cir. 1995) (if allegations of bias arise from judicial proceeding, impossibility of fair judgment standard "implicated").

One must presume that the Opinion below cited *Liteky* with full knowledge of both this Court's majority holding and Justice Kennedy's concurring opinion. Accordingly, it is fair to conclude that the Opinion consciously rejected the "impossibility of fair judgment" test, opting instead to follow Justice Kennedy's concurrence. In so doing, the panel adopted a new test, under which a potential compromise of impartiality or a serious concern of partiality will suffice:

> A thoughtful observer . . . would conclude that a preview of evidence by a panel of experts who had become partisans carries an *unacceptable potential* for compromising impartiality.
>
> . . . .
>
> Additional statements by the judge also would cause a reasonable observer to be *seriously concerned* about the court's ability to conduct the trial impartially.

App. 35-36 (emphasis added).

Under *Liteky*, the panel's findings were insufficient to support removal of the District Judge under § 455(a). If the standard is now an "unacceptable potential" or a "serious concern" about impartiality, this Court should pronounce that standard. Accordingly, petitioner respectfully requests that this Court grant the petition and issue a writ of *certiorari* to rectify the Seventh Circuit's departure from the *Liteky* standard, thereby resolving the conflict the Opinion creates with decisions from other circuit courts on this issue.

III. THE SEVENTH CIRCUIT DEPRIVED THE DISTRICT JUDGE OF HIS PROCEDURAL RIGHT TO BE HEARD PURSUANT TO RULE 21 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 21 of the Federal Rules of Appellate Procedure provides procedural safeguards designed to ensure that a district judge has a fair opportunity to respond to a petition for a writ of mandamus. With extraordinary and unnecessary haste, the Seventh Circuit preliminarily determined, one business day after it was filed, that the petition at issue here merited a response. With similar celerity, the Seventh Circuit ruled on the petition three days after the "real-parties-in-interest" filed their answer and one day before the date the District Judge sought leave to file his answer. Proceeding in this manner violated Rule 21 and deprived Judge Duff of a fair opportunity to be heard.

Rule 21 requires that if an appellate court is not of the opinion that the petition for writ of mandamus should be denied, the court shall "order that an answer to the petition be filed by the *respondents*." (emphasis added). Rule 21 explicitly provides that the district judge is a "respondent" within its meaning. Rule 21(b) further provides that the clerk of the Court of Appeals shall serve the order requiring the *respondents* to answer upon the respondent judge and that the clerk also "shall advise the parties of the dates on which briefs are to be filed, if briefs are required, *and of the date of oral argument.*" *Id.* (emphasis added). The orders entered by the Seventh Circuit directing the "real-parties-in-interest" to answer the petition did not comply with Rule 21. By requesting responses only from the litigants, by failing to hold oral argument, and by issuing its writ of mandamus after

receiving the litigant's briefs and before informing the District Judge whether and when he should respond, the Seventh Circuit panel deprived Judge Duff of his unqualified right, *and duty*,[8] to respond to the defendants' attack upon his refusal to recuse himself in the case.

The lack of an opportunity to be heard is of significant importance here. At several critical points in its Opinion, the panel *presumes* certain allegations made against Judge Duff were true, despite the fact that the District Court did not have the opportunity to answer the allegations. The plain language of Rule 21 precludes such presumptions by explicitly stating that even if a district court declines to participate in the proceedings, the allegations of the petition shall not be deemed admitted. *See* Fed. R. App. P. 21(b). Even in the context of a direct appeal, courts have refrained from presuming facts against a federal judge, opting instead to remand for an evidentiary hearing before another district judge to resolve any factual uncertainties. *See Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 447 (6th Cir. 1980) (remanding for evidentiary hearing to determine whether judge deliberately gathered facts outside the record, and thereby obtained personal knowledge of disputed evidentiary facts concerning the proceedings), *appeal after*

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[8] "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989) (denying petition for writ mandamus seeking disqualification of district judge under § 455); *see also Laird v. Tatum*, 409 U.S. 824, 837, 93 S. Ct. 7, 14-15 (1972) ("Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*.").

remand, 649 F.2d 416, 419-20 (6th Cir.) (concluding on appeal after remand for evidentiary hearing that judge was not improperly influenced by fact-finding of clerk), *cert. denied*, 454 U.S. 1099 (1981). The Opinion's improper and inaccurate presumptions – and the disturbing speed with which the panel ruled on the petition – deprived the District Judge of a fair opportunity to be heard on these very issues. That was not only unfair, it was unjust and unbecoming.

Nor was there any apparent need for the great speed with which the Seventh Circuit acted; it could have allowed itself, the parties and the District Judge more time by granting Respondents' motion to stay the proceedings in the trial court. At the very least, the Seventh Circuit could have granted the District Judge's motion for clarification filed on Friday, July 12, 1996, which requested until the following Friday, July 19, 1996, to respond to the petition; the extraordinary writ was granted on Thursday, July 18, 1996, without ever hearing from Judge Duff. Indeed, any of these vehicles – including oral argument – would have allowed Judge Duff to explain why the key assumptions of fact made by the Seventh Circuit at defendants' behest were erroneous. The District Judge's explanation on the record,[9] as well as

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[9] On June 18, 1996, the District Court fully explained on the record its recollection of the September 7, 1994 meeting. The District Court clearly stated that it only informed the experts and Professor Morris that whatever form the experts' opinion took, it at least had to have a scientific methodology. After the parties had invested several years and several hundred thousands of dollars in the expert's report, the District Judge reminded them of the panel's obligations, as well as his own:

Professor Morris' Affidavit, establish that Judge Duff did not surreptitiously entertain any substantive discussions about the merits with the experts concerning their report. The meeting was promptly disclosed to the parties in the routine monthly reports Professor Morris distributed to all the parties.

> Now, if indeed Professor Morris told them "You're going to have to show the judge that you have a scientific methodology," that wouldn't have been because I was trying to be influenced on the case, *that's because I was trying to serve both of you in our efforts to settle this report and get a decent proposal out that wouldn't be attacked by the press and the legislators and a lot of other people that you're going to need.*

Pet. App. Ex. (III) C, at 44 (emphasis added). Judge Duff further disclosed on the record that he never told the experts what they should say or how they should support their opinions:

> Now if you want – you can try to attack their methodology if you want, that's fair. Your experts may say "That's not the way they should have done it," and they will say "Well, I think this is the way we should have done it."
>
> *I didn't tell them what to do. They decided on their methodology. Rule 26 tells you and the Daubert decision tells you that you can examine their methodology.*

Pet. App. Ex. (II) K, at 37 (emphasis added). Accordingly, contrary to the Seventh Circuit's conclusion, *see* App. 31, the District Court *did* divulge its recollection of the September 7, 1994 meeting on the record.

In other situations, a court's statement on the record has ended the inquiry. *See, e.g., Schurz Communications v. F.C.C.*, 982 F.2d 1057, 1061 (7th Cir. 1992) (Posner, J., in chambers) (because judge has "no recollection of having received information from any source other than public documents," motion for recusal denied).

Failing to give a district court judge an opportunity to respond to petition for a writ of mandamus is a recognized reason for vacating the grant of a writ. In *In re Repetitive Stress Injury Litigation*, 35 F.3d 637 (2d Cir. 1994), for example, the Second Circuit vacated its earlier grant of a writ to allow the district court judge an opportunity to determine whether he wished to participate in the appellate proceedings. *Id.* at 639. In that case, and in apparent consideration of the district court's schedule, the Second Circuit granted the district judge 10 days to notify the clerk if he intended to file such papers and 30 days to file whatever papers he chose to file. *Id.* at 640. Consistent with the *In re Repetitive Stress* decision, this Court should grant the petition for *certiorari*, vacate the grant of the petition for writ of mandamus, and permit the District Judge an adequate and full opportunity to respond to the petition.

CONCLUSION

For all these reasons, the petition for a writ of *certiorari* should be granted.

Dated: Chicago, Illinois
November 22, 1996

Respectfully submitted,

The Honorable Brian Barnett Duff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

K.L., *et al.*,	)	
Plaintiffs	)	
v.	)	No. 92 C 5722
JIM EDGAR, *et al.*,	)	
Defendants	)	

MEMORANDUM OPINION

On June 14, 1996, the defendants presented this Court with a motion for recusal.[1] That motion requested that this Court disqualify itself pursuant to 28 U.S.C. §§ 144, 455(a) and 455(b)(1).[2] On June 18, 1996, the

[1] The previous day, June 13, 1996, the defendants filed an emergency motion five minutes prior to the scheduled status hearing which sought discovery on the possibility of recusal, stay of the proceedings, and a protective order. The June 13th emergency motion indicated that if the defendants found a motion for recusal warranted, they intended to file one by Monday, June 17, 1996. Given the rapidly approaching July 15, 1996 trial date, this Court required that the defendants file any such motion by the close of business on Friday, June 14, 1996. The defendants then submitted their motion within the deadline.

[2] This Court presumes a familiarity with the motions and the underlying events in this case; for more background information, the parties' briefs can also be reviewed.

defendants submitted a new round of documents, including the affidavit from a party which must accompany a § 144 motion. Per this Court's request, the plaintiffs filed their response in chambers on June 30, 1996, addressing the three statutory sections relied on in the defendants' motions.[3] This Court addresses each statutory section in turn below. Since the filing of the defendants' motions, this Court has reviewed the briefs and the voluminous appendices provided in support and has thoroughly considered whether I harbor any prejudice or bias towards the defendants. After thoughtful consideration, I find no reason to disqualify myself from this case.[4]

I. SECTION 144 RECUSAL

Pursuant to 28 U.S.C. § 144, "whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall

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[3] The defendants' reply was submitted on July 1, 1996 along with a third massive two and a half inch appendix. For the reasons stated in open court, this reply is stricken as improper. The defendants' previous reply was stricken because it was improperly filed before the plaintiffs' response.

[4] As an initial matter, this Court does not discuss in this opinion every document or event presented by the defendants. If I did, I would be unable to address the defendants motions in any timely fashion. While not every document or argument is discussed, I have considered all of them and still find no reason to disqualify myself.

be assigned to hear such proceeding." Recusal is mandatory under § 144 once a party submits a timely and sufficient affidavit and counsel presents a certificate stating that the affidavit is made in good faith. *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993).

"Because the statute 'is heavily weighed in favor of recusal,' its requirements are to be strictly construed to prevent abuse." *Id.* (citing *United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir. 1985)). Section 144, therefore, presents various procedural requirements with which the party moving for recusal must comply. First, the affidavit must be timely. "A section 144 affidavit is not timely unless filed 'at the earliest moment after [the movant acquires] knowledge of the facts demonstrating the basis for such disqualification.' " *Id.* (citations omitted).

As a preliminary matter, this Court must decide which affidavit was submitted to be considered along with the § 144 motion. On June 14, 1996, the defendants filed an "appendix to the defendants' memorandum in support of emergency motion for recusal," which included an affidavit from Tim Patenode, one of defendants' counsel. In the affidavit, Mr. Patenode detailed the documents which he viewed on June 12, 1996 but was prohibited from copying. The plaintiffs note in their response that if this was the affidavit to accompany the § 144 motion then it was both inadequate and insufficient since it was not from a party and the motion lacked a certificate of good faith. This Court agrees that Mr. Patenode's affidavit is insufficient under § 144.

The defendants filed another affidavit on June 18, 1996. This affidavit was from the Director of the Department of Mental Health and Developmental Disabilities, Ms. Ann Patla, and was accompanied by a certificate of good faith signed by Joel Chefitz, another of defendants' counsel. The defendants apparently intended this affidavit to accompany the § 144 motion since they labelled it "Affidavit of Ann Patla pursuant to 28 U.S.C. § 144." This Court notes that the defendants did not file Ms. Patla's affidavit accompanying the § 144 motion by the June 14, 1996 deadline; nor did they indicate to this Court that they required more time in order to file the accompanying affidavit for a § 144 motion. Instead, they simply presented the supporting documents on Tuesday, June 18, 1996. Ms. Patla states that the requirements of state business mandated the short delay; however, given the pressing trial date, the important subject matter of this case, and the serious nature of the defendants' motion, I find that this delay was unwarranted.

Furthermore, Ms. Patla states in her affidavit that "only within two weeks preceding the filing of the motion have defendants received [relevant] information. . . . " Patla Aff. at ¶ 2. Assuming these statements to be true, this Court still finds that Ms. Patla's affidavit was untimely. This Court agrees with the plaintiffs that prior to June 12, 1996 the defendants were aware of a great deal of the information to which they cite in their motions.[5]

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[5] As the plaintiffs' note, the defendants filed an *in camera* memorandum in November 1995, which stated that this Court had held "substantive discussions with the panelists, both directly and in through their Manager, Professor Morris." Defs.

While two weeks might not normally be an excessive delay in filing, in this case the defendants waited until almost the eve of trial to bring their motions. Two weeks, in this context, constitutes an unwarranted delay. *See Schurz Communications, Inc. v Fed. Communications Comm'n*, 982 F.2d 1057, 1060 (7th Cir. 1992) (chambers opinion) ("The requirement of timeliness 'prohibits knowing concealment of an ethical issue for strategic purposes"). While courts generally have found affidavits untimely when the movant waited several months to file or postponed until the eve of trial, the rapidly approaching trial date for this complex case mandated that the defendants act more promptly in presenting their ethical issue to this Court. *See, e.g., Sykes*, 7 F.3d at 1939 (concluding that an affidavit was untimely when the movant waited until after her sentencing, more than two months after the allegedly prejudicial statement to file her affidavit); *United States v. Barnes*, 909 F.2d 1059, 1072 (7th Cir. 1990) (finding an affidavit untimely when the party waited until the day of trial, a delay of five months, to allege bias). Consequently, I find the affidavit untimely but will not allow these matters to prohibit me from addressing the serious allegations presented in the motions for recusal.

In determining the legal sufficiency of the affidavit, this Court must assume the truth of its factual assertions

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2d App. Ex. A at 1. This Court finds it troubling that the defendants apparently possessed some information by November 1995 but waited until the eve of trial to bring their motions. Given the seriousness of the defendants' allegations, I will nevertheless address their motions on the merits.

even if it "knows them to be false." *Id.* (quoting *Balistrieri*, 779 F.2d at 1199). The facts "averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient." *Id.* Furthermore, the affidavit must show "that the bias is personal rather than judicial, and that it stems from an extrajudicial source – some source other than what the judge has learned through participation in the case." *Id.*

As this Court is required to do, it assumes all facts averred in the affidavit as true and disregards all conclusions or opinions. Upon such a review, Ms. Patla's affidavit is insufficient to convince a reasonable person that bias exists. She states that a series of communications between the expert panel and others occurred; however, not one of these events indicates any actual prejudice or bias by this Court against the defendants. Specifically, Ms. Patla states that Mark Heyrman, a lawyer with the Mandel Legal Aid Clinic, communicated with both Dr. Okin and Ms. Knisley, the court-appointed experts, and that Dr. Okin contacted Ira Burnim of the Bazelon Center for Mental Health Law regarding this case and potential strategies. Patla Aff. at ¶¶ 12-14. Presumably, the court-appointed experts may contact other individuals in their field or in related ones. Whether or not they contacted an individual, without this Court's knowledge, whose involvement in this case the defendants opposed does not affect this Court's impartiality or my ability to preside over the case at bar. The experts' communications with other individuals in related fields, the extent of which this Court was unaware, would not convince a reasonable person that bias exists.

Similarly, the September 7, 1994 meeting between this Court, Professor Morris, the court-appointed experts, and their consultant, Dannia Southerland, does not indicate that this Court possesses any bias or prejudice against the defendants. Ms. Patla's affidavit cites to a document entitled "Outline for Conference with Judge Duff, 9/7/94." Dr. Okin's outline includes such topics as "History and rationale for the methodological approach [the court-appointed experts] chose for our inquiry in *K.L. v. Edgar*," five "ways in which [the panel's] approach differs from other inquiries such as JCAHO," "three irreducible obligations of the modern state hospital," and "general findings" of the outline including the hospitals' "failures" to meet purported obligations. Patla Aff. at ¶ 3.

Even if these topics were actually discussed in the September 7, 1994 meeting, there is no indication that this Court cannot objectively assess the expert panel's testimony during trial. Simply because the expert panel may have discussed its methodological approaches relied on in its draft report does not demonstrate that this Court accepted them or that the meeting created any bias or prejudice against the defendants. Again, one meeting with the court-appointed experts regarding their report when the case was still in a settlement posture would not convince a reasonable person that any bias or prejudice exists or that this Court could no longer objectively assess the credibility of the experts' testimony. Furthermore, this Court's minimal contact with the experts was not prohibited by the agreed order to appoint expert witnesses and does not constitute an extrajudicial source for bias. Rather, it was as part of this Court's judicial function that

it had the September 7, 1994 *ex parte* meeting with the expert panel.

The affidavit also raises other instances of contact between the court-appointed panel and this Court. As an example, the defendants cite to Dr. Okin's November 8, 1995 request to speak to me regarding the defendants' concept paper. Certainly, Dr. Okin was entitled to request a meeting; however, no meeting occurred. The fact that Dr. Okin sought a meeting or sent a letter which suggested contact with the state legislature and the Governor does not lead to the conclusion that this Court can no longer preside over this case. A reasonable person would not be convinced that simply because an expert attempts to make contact with the Court that such contact was successful. Similarly, Ms. Knisley's December 18, 1995 letter to reviewers which simply stated that the "Judge is pleased with the report" is not an indication of bias or prejudice; such a statement could also be viewed as approval of the quality of the product and not its substance. Patla Aff. at ¶ 5. In any event, the statements presented do not demonstrate any actual prejudice or bias.

The affidavit then cites to a series of rulings and comments which this Court made from the bench. As a preliminary matter, this Court notes that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." *Liteky v. United States*, 114 S.Ct. 1147, 1157 (1994). Ms. Patla's affidavit emphasizes the timing of this Court's requests that the Governor appear for a settlement conference. As the affidavit states:

> [p]rior to a hearing on May 10, 1996, both sides submitted status reports to the Court. Each side stated that there was no prospects for settlement at this time. But on May 10, 1996, at the hearing of Defendants' Motion for Full Disclosure, [this Court] again raised the subject of settlement, stating that 'I think it would be very valuable to have the Governor and Ms. Patla in here in the kind of open sessions we have had before to discuss this thing. . . . '

Patla Aff. at ¶ 19. The defendants argue that my subsequent comments indicate that I placed pressure on the Governor to appear and attempt to settle this case. Emphasizing settlement, even if the parties do not believe that there are any prospects for it, does not indicate any prejudice or bias towards the defendants. Presumably, a judge can continue to press for settlement as a cost-effective and time-efficient alternative to a lengthy trial. Similarly, the comment which the defendants have characterized as a "veiled threat,"[6] can also be viewed as an

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[6] A more complete review reveals the settlement context for these comments:

> THE COURT: I'm telling you now, I have the right in my opinion, and more than that, it shouldn't be a function of right. Jim Edgar could say "Gee, if Brian Duff wants to talk to me, I should go up there and talk to him or let him come down and talk to me," which I would do too, or I can walk down the street and talk to him.
>
> There is no reason in the world – we are not a bunch of people hiding behind badges and seals and symbols. I knew Jim Edgar when he ran errands for the people in the legislature. He is a fine man, he has had a great career, he is doing a good job, but who the hell says he shouldn't talk to somebody in my position.

effort to cajole or resurrect settlement discussions. Aff. at ¶ 20. While this Court must accept all the facts averred as true, it has no obligation to accept the defendants' inferences or conclusions from these facts.

Similarly, this Court does not have to accept the defendants' conclusion that it "has acted as if it fully accepts the expert panel's opinions as facts." Patla Aff. at ¶ 9. In her affidavit, Ms. Patla quotes several comments from a May 25, 1995 hearing where I stated that "there are no conclusions in that report" and then read segments of the panel's report and concluded that they were assertions of fact. In citing these statements, the defendants choose selectively from the transcript of those proceedings. A more inclusive readings of that day's transcript reveals that when I said "no conclusion" it was a type of shorthand for "no conclusion regarding the law or legal remedies." While perhaps this Court's lack of precision might lead a reasonable person who only read these selected portions to believe that I thought they were assertions of fact, a thorough reading of the transcript

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Do you know how many cases that I have in this courtroom right now that the Governor is very, very concerned with? Do you?

MR. CHEFITZ: I imagine a few.

THE COURT: Well, you're supposed to be responsible for everybody who wants to talk to the Governor. You should know that the recent revenue bill is up here for a preliminary injunction within weeks, including hundreds of millions of dollars, they tell me, or many millions of dollars of revenue to the state of Illinois. Does that mean that I'm not important to the Governor or that somehow or other I'm being pretentious?

Patla Aff. at ¶ 20; Defs. App., Ex. AA, Transcript of May 10, 1996 proceedings at 69-70.

demonstrates the contrary. Even assuming that this Court accepted portions of the report as the experts stating what they perceive to be facts, the transcript demonstrates that this Court remained open-minded. In fact, the transcript illustrates that I indicated that the defendants were entitled to challenge the expert panel at trial.

Finally, the defendants list this Court's repeated denials of the defendants' motion for immediate disclosure of information considered or received by the panel. Patla Aff. at ¶ 8. A review of this Court's comments however reveals no prejudice or bias. Initially, this Court refused access to this material on March 25, 1995 because it believed that "there [was] no place in that agreement that I can see that you have a right *now* to go down and examine the particulars of [the panel's] research." *Id.* (emphasis added). This Court did not deny the defendants' request without reason; I declined to allow access before the discovery period. Moreover without the agreed order in front of it, the Court refused to allow unlimited access to the panel's information.

Furthermore, this Court's failure to sign the order proposed by the defendants is also not indicative of any bias. As Ms. Patla's affidavit notes, this Court stated on February 1, 1996:

> I don't remember saying this, and perhaps I don't remember what's included when it says 'immediate disclosure of information received or considered by the expert panel.' I don't know how broad that is, so I think I really should look – it sounds very broad and I think I really should look at that motion."

Patla Aff. at ¶ 8. This statement clearly indicates that it was not this Court's intention to completely prohibit the defendants' access to this information; rather, I was concerned with the scope and breadth of that disclosure and could not remember at that instant how encompassing my previous ruling on that topic had been.

Moreover, when the defendants sought not only the panel's supporting data and information, but also requested documents pertaining to *ex parte* communications with this Court, Ms. Patla's affidavit states that I responded that the motion was "very bold, and I think there is no law to support what you say you seek." Patla Aff. at ¶ 8. But then as the affidavit itself states, this Court established a briefing schedule for the motion. Certainly, a judge may comment that he believes that a motion may be unwarranted or baseless without indicating any prejudice or bias. In fact, this Court's statements indicate that it was willing to be persuaded and accordingly, established a briefing schedule on the motion.

Overall, the affidavit simply points to various correspondence between the experts and other individuals; the defendants do not claim that this Court was aware of these contacts, which were only revealed to this Court through this motion. Nor do the defendants demonstrate that the experts' contacts with these individuals was improper. Attacking the experts cannot be a backdoor to attacking this Court. Consequently, even if the experts engaged in improper discussions or communications, and this Court is not concluding that they have, this would not lead to my disqualification. A reasonable person would not conclude that this Court could no longer impartially preside over this case because the expert

panel was in contact with Mark Heyrman. Furthermore, none of this Court's comments or rulings would convince a reasonable person that it has any prejudice or bias against the defendants.

II. SECTION 455

Section 455(b)(1) provides for disqualification under similar circumstances as § 144. Section 455(b), however, does not have the strict procedural requirements of § 144. As with a § 144 motion, a judge should disqualify himself "where he has a personal bias or prejudice concerning a party . . . "; unlike § 144, this Court does not need to take the factual averments of the affidavit as true and can make credibility determinations and contradict the evidence with facts drawn from its personal knowledge. *United States v. Balistrieri*, 779 F.2d at 1202. This Court again must consider whether a reasonable person would be convinced that a judge was biased. *Id.* at 1203.

As in *Balistrieri*, if the affidavit was insufficient to compel disqualification under § 144, when all its factual averments are assumed true, it could not possibly compel recusal under § 455(b)(1). *Id.* The defendants, however, rely on more than Ms. Patla's affidavit; they submit massive documents, primarily correspondence from and to the expert panel and transcripts from proceedings before this Court. Many of these materials are referred to in Ms. Patla's affidavit which this Court discussed above; accordingly, this Court will only refer to them again briefly.

This Court feels compelled to correct the defendants' misstatements and improper inferences which they rely

on to demonstrate actual prejudice or bias. First, the defendants imply in their memorandum in support of the emergency motion for recusal that this Court acted in bad-faith by delaying ruling on their motion for partial judgment on the pleadings. They state that the motion was filed on December 18, 1995 "and it has been fully briefed for months. Yet it remains undecided, despite defendants' need to know how far-ranging the trial will be." Defs. Mem. at 8. This Court acknowledges that the initial motion was filed on December 18, 1995 and became fully-briefed on March 18, 1996, when the defendants filed their reply. The defendants, however, fail to mention that the motion's resolution was affected by the plaintiffs motion to file an amended complaint. The plaintiffs raised this issue on April 16, 1996 and that motion was not fully-briefed until May 14, 1996. In the interim, it was uncertain whether the defendants' motion for partial judgment had become moot. Only in late May was it made clear to this Court that the defendants' motion for partial judgment also stood as to the amended complaint. Consequently, the motion for leave to file the amended complaint became intertwined with the defendants' motion for partial judgment and both await resolution. This Court appreciates the defendants' need to know how "far-ranging the trial will be" but it takes exception with the defendants' implications.[7]

The defendants also imply that there is "behind-the-scenes coordination with the . . . potential witnesses on

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[7] Moreover, the defendants have requested that this Court refrain from ruling on the motion for partial judgment during the pendency of the motion for recusal.

the subject of . . . settlement and on exerting political pressure on elected States leaders. . . . " In support of this contention, the defendants cite to Dr. Okin's December 7, 1995 letter which suggested contacting the state legislators or the Governor regarding the case. The defendants rely on this letter to demonstrate that there is "active coordination"; however, the defendants fail to refer to previous court proceedings where this Court had suggested meeting with the Governor or other officials regarding settlement. *See* Defs. App. Ex. O, Transcript of May 25, 1995 proceedings, at 57 ("I have told you before that I would be glad to talk to the Governor if he wants to assess the case from his perspective."); Defs. App. Ex. P, Transcript of September 27, 1995 proceedings, at 9. A non-selective review of my comments, therefore, demonstrate neither "active coordination" nor prejudice or bias.

The defendants also take exception to this Court's repeated attempts to require the Governor to appear at a settlement conference. After filing the motion for recusal, the defendants submitted a "memorandum of law on the Court's authority to order the Governor to appear at a settlement conference." Having reviewed this document, this Court is persuaded that it does not have the power to compel the Governor to appear for a settlement conference as long as an official with settlement authority is present. To the best of my knowledge, no individual with settlement authority has ever appeared before this Court. While this Court mistakenly believed it had the power to compel the Governor's attendance, once the misunderstanding was brought to its attention through the defendants' memorandum, this Court acknowledged the possible error and refused to pursue the issue further.

Regardless, this Court's comments in attempting to cajole or compel the Governor's attendance do not rise to the level of actual prejudice or bias. Certainly, a judge may attempt to facilitate settlement at any stage of litigation. If on occasion this Court expressed impatience or dissatisfaction with the failure to reply to its requests, this is still insufficient for recusal.[8]

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[8] In fact, on many occasions, this Court simply invited or requested the Governor's attendance in order to facilitate settlement. While the defendants have selectively chosen excerpts from the transcripts, this Court feels obligated to provide a more complete review of my comments towards and about the Governor. These comments demonstrate that on many occasions this Court simply requested that Governor attend confidential settlement conferences in order to settle the case or alternatively, to move the case forward. *See, e.g.*, Defs. App. Ex. Y, Transcript of March 25, 1996 proceedings at 13 ("I want the Governor in a confidential negotiation settlement conference. Tell him I invite him, I would appreciate if he will come. And I'm not saying this in terms of any forceful suggestion . . . "). Accordingly, I provide a brief list of excerpts which demonstrates my on-going attempts to facilitate a settlement in this case and to obtain the Governor's cooperation. *See, e.g.*, Defs. App. Ex. O, Transcript of May 25, 1995 proceedings at 57 ("I have told you before that I would be glad to talk to the Governor if he wants to assess the case from his perspective. I know the Governor. He is a nice, intelligent man. I'll be happy to have him come in and sit around our conference room"); Defs. App. Ex. R, Transcript of December 7, 1995, at 12-13; 17-18; Defs. App. Ex. S, Transcript of December 13, 1995 proceedings at 27-30 ("I would say to you that I was in the legislature, when the Governor was administrative assistant to the Speaker, and I know him. I could talk to him and find out what he thinks without talking law . . . and I don't mean to go around you to your clients, so to speak"); Ex. Y at 23-24.

The defendants' other grounds for recusal are repetitive of those presented in Ms. Patla's affidavit. As mentioned previously, the defendants attempt to characterize this Court's repeated denials of their motion for immediate disclosure of information considered or received by the panel as improper protection of the panel. As their chronology and transcripts indicate, this Court initially denied their motion because discovery had not yet commenced. Other denials were based on this Court's concern regarding the scope of the disclosures; nowhere did this Court indicate that the experts were immune from attack during trial. Furthermore, when this Court found it appropriate, it authorized the release of information relied on by the expert panel to draft its report.

This Court's actions were case management decisions not motivated by any prejudice or bias. Instead, a review of the transcripts indicates that this Court also reprimanded the plaintiffs for their repeated attempts to adopt the expert panel as their own. This Court's actions demonstrates a considered attempt to maintain the expert panel's non-partisan nature. This neither demonstrates actual bias or prejudice by the Court towards the defendants nor places any taint on the Court itself.

None of the documents presented in their multiple appendices demonstrates any actual prejudice or bias against the defendants. The defendants were contemporaneously aware of many incidents about which they now complain. All but of few of the communications were not even directed to this Court. For example, while the defendants now protest the September 7, 1994 meeting, they were notified that it occurred because a copy of Professor Morris' monthly report was forwarded to both parties'

counsel in October 1994. The defendants have not indicated any extrajudicial source of bias; they cannot simply rely on this Court's occasional impatience or rulings to justify recusal.

This leaves the defendants one possible avenue: § 455(a). Pursuant to 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court recently discussed in *Liteky v. United States*, 114 S.Ct. 1147 (1994), the considerations in determining whether recusal is necessary under § 455(a). As with § 455(b), the Supreme Court determined that the "extrajudicial source" doctrine also applied to § 455(a). Consequently, the Court concluded that "judicial rulings alone almost never constitute valid basis for a bias or partiality motion." *Liteky*, 114 S.Ct. at 1157. The Supreme Court then stated that:

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."

This Court, however, notes that the Seventh Circuit has indicated that § 455(a) "asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." *In the Matter of Bradford Mason*, 916 F.2d 384, 386 (7th Cir. 1990).

Section 455(a) is not intended "to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process." *Balistrieri*, 779 F.2d at 1204 (citation omitted).

The defendants cite to several cases where district courts were required to recuse themselves because the judge's impartiality could reasonably be questioned. These cases involve more extreme situations than any event in the case at bar. For example, the defendants cite *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), a case in which a district court judge issued a preliminary injunction against blocking abortion clinics. In that case, the judge then appeared on the nationally-televised program "Nightline" to discuss the subject-matter of the pending case. On the program, the Judge stated that "these people [the protestors] are breaking the law." The appellate court emphasized that by appearing on national television, which was "an unusual thing for a judge to do," the judge had:

> unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protestors, rather than remaining as a detached adjudicator.

1 F.3d at 995. The fact that the Judge had so publicly commented on a pending case seems to have affected the appellate court's analysis.

While *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir. 1992) did not involve a motion for recusal under § 455(a), the appellate court similarly reassigned a case because of the appearance of bias. Relying on its "supervisory authority to order cases reassigned to another district

court judge," the Third Circuit determined that the district court's widely-publicized statement from an opinion in which the judge asserted:

> In light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of the consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide that illness and death of consumers is an appropriate cost of their own prosperity!
>
> As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

975 F.2d at 97. The comments of the judge were reproduced in the New York Times, the Wall Street Journal, the Washington Post, the Chicago Tribune, and the Los Angeles Times. The fact that the district court judge made these statements during discovery created the appearance of impropriety. In *Cooley* and *Haines*, the district court judges made widely publicized statements which seemed to indicate that they had decided the outcome of the cases prior to a resolution on the merits. Understandably, the appellate courts concluded that the judge's impartiality could reasonably be questioned. The case at bar is distinguishable since this Court has made no such statements; the cases to which the defendants themselves cite demonstrate that this Court's actions do not warrant recusal.

In their reply, the defendants bring to this Court's attention *In re School Asbestos Litigation*, 977 F.2d 764 (3rd Cir. 1992). In that case, the district court judge was presiding over a nationwide products liability class action brought in connection with asbestos in school buildings when he attended a conference on asbestos, where his expenses and the conference itself were financed by the class plaintiffs. The appellate court concluded:

> We are convinced that a reasonable person might question [the judge's] ability to remain impartial. To put it succinctly, he attended a predominantly pro-plaintiff conference on key merits issue; the conference was indirectly sponsored by the plaintiffs, largely with funding that [the judge]himself had approved [from the settlement fund from previous litigation]; and his expenses were largely defrayed by the conference sponsor with those same court-approved funds. Moreover, he was, in his own words, exposed to a Hollywood-style 'pre-screening' of the plaintiffs' case: thirteen of the eighteen expert witnesses the plaintiffs were intending to call gave presentations very similar to what they expected to say at trial.

In reaching their decision that disqualification was required under § 455(a), the Third Circuit emphasized that all these circumstances together created the appearance of partiality. The financial aspects of *In re School Asbestos Litigation*, specifically the fact that the judge's expenses were indirectly paid by plaintiffs through court-approved funds clearly distinguishes that case from the case at bar. Moreover, *In re School Asbestos Litigation* involved plaintiffs' experts, not a panel of experts appointed pursuant to an agreed order. Finally, the Third

Circuit did not find that a "Hollywood style pre-screening," which did not even occur in the case at bar, by itself, would be enough for the judge's disqualification. Consequently, this Court finds the defendants' authority unpersuasive.

If on occasion this Court expressed dissatisfaction with the defendants, it was the result of my perception that the defendants' were dilatory in the discovery process or attempting to delay the trial. At times, in order to manage this case, this Court has had to reprimand both parties. None of these comments indicate any deep-seated favoritism or antagonism and none result from any extrajudicial source. Consequently, this Court finds no reason to disqualify itself pursuant to § 455(a).

III. CONCLUSION

This Court has carefully reviewed the defendants' motions and their supporting documents. Given the serious nature of the allegations contained in these motions, I have attempted on every occasion to consider the defendants' motions on the merits rather than bar them on procedural grounds. The defendants, however, present no justifiable reason why this Court should disqualify itself from continuing to preside over this case. I find it unfortunate that the defendants have chosen to rely on incomplete statements which are taken out of context and improper characterizations to support their motions. Defendants' counsel are sophisticated attorneys skilled in motion practice; whether intended or not their motions have only served to delay the trial. After a complete review of the transcripts and events in this case,

I conclude that there are no grounds to recuse myself and will continue to preside over this case.

ENTERED:

July 2, 1996

/s/ Brian Barnett Duff
BRIAN BARNETT DUFF, JUDGE
UNITED STATES
DISTRICT COURT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

NOTICE TO RESPOND

Date: July 5, 1996

No. 96-2641

IN THE MATTER OF:

JAMES R. EDGAR, Governor of the State of Illinois and ANN PATLA, Director of the Department of Mental Health and Developmental Disabilities,
Petitioners

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 92 C 5722, Brian Barnett Duff, Judge

IT IS ORDERED that the Real Parties-in-Interest file a response to the PETITIONER'S EMERGENCY MOTION FOR STAY OF PROCEEDINGS AND CONTINUANCE OF TRIAL PENDING DECISION OF PETITION FOR WRIT OF MANDAMUS and the PETITION FOR ISSUANCE OF WRIT OF MANDAMUS DISQUALIFYING DISTRICT JUDGE, filed on 7/3/96. Response is due by 7/11/96.

(031-112195)

Case Information

Docket # : 96-2641 Lower Docket: 92 C 5722
Short Title: Edgar James R. v Duff, Brian B.

DOCKET TEXT

Filed	EntryDate	LastUpdate
07/11/96	07/12/96	**/**/**

Hist ID	By	Complete
853699	elea	y

TEXT

ORDER issued re: Emergency motion to extend time to file response and [853079-1] emergency motion for stay. IT IS ORDERED that the motion is GRANTED in part. The response date is extended to 9:00 a.m. on 7/15/96. [851476-1] AM [96-2641]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JIM EDGAR, Governor of the State of Illinois and ANN PATLA, Director of the Department of Mental Health and Developmental Disabilities,

Defendants-Petitioners,

v. Case No. 96-2641

K.L., L.F. and R.B. on behalf of themselves and all persons similarly situated,

Plaintiffs-Respondents,

THE HONORABLE BRIAN BARNETT DUFF, United States District Judge for the Northern District of Illinois,

Respondent.

RESPONDENT'S EMERGENCY MOTION FOR CLARIFICATION AND FOR EXTENSION OF TIME FOR FILING RESPONDENT'S BRIEF

(Received July 12, 1996)

Respondent, The Honorable Brian Barnett Duff of the United States District Court for the Northern District of Illinois, respectfully requests this Court to clarify the Court's orders entered July 5, 1996 and July 11, 1996 and, if necessary, to extend the time at which respondent may file his responses to defendants-petitioners' Emergency Motion for Stay of Proceedings and Continuance of Trial, and Petition For a Writ of Mandamus, to the close of business on Friday, July 19, 1996. In support of his motion, respondent states as follows:

1. On July 5, 1996, this Court entered an order which provided that "[r]eal parties-in-interest" must respond to the defendants-petitioners' emergency motion for stay of proceedings and continuance of trial pending decision of the petition for writ of mandamus by July 11, 1996. On July 11, 1996, this Court extended the time for filing these responses to 9:00 a.m. July 15, 1996.

2. After receiving the Court's July 5, 1996 order, Respondent's staff contacted the Clerk of this Court to determine whether it was a "real party-in-interest" and was therefore bound by the order to file a response by July 11, 1996. The Clerk's Office indicated that Respondent was not expected to file a response by July 11, 1996 and that this Court would notify him of when his response was due, if a response was requested. Thereafter, Respondent obtained counsel to assist him in responding at the appropriate time to the defendants-petitioners' motion and petition for a writ of mandamus should the court find it appropriate.

3. Because of Respondent's uncertainty regarding the Court's July 5, 1995 and July 11, 1996 orders, Respondent respectfully requests a clarification that he does not fall within the Court's orders requiring a response by July 15, 1996 to petitioner's motion and its underlying petition. In the event that this Court viewed Respondent to be a "real party-in-interest" within the meaning of its July 5, 1996 and July 11, 1996 orders, Respondent hereby moves the Court pursuant to Federal Rules of Appellate Procedure 26(b) and 27(b) for an order extending the time for filing his response until the close of business on Friday, July 19, 1996.

4. Petitioner has been and for the near future will be on trial every day. Because of his heavy trial load, and because the circumstances and issues raised by defendants-petitioners' motion, petition and the volume of appendices, Respondent requests an additional 4 days, until July 19, 1996, to prepare and file an appropriate response, if necessary.

5. Counsel for Respondent has contacted counsel for the defendants and for the plaintiffs on this issue. While plaintiffs do not object to the request for clarification, and potential extension, defendants do.

WHEREFORE, Respondent, The Honorable Brian Barnett Duff, United States District Court Judge for the Northern District of Illinois, requests that this Court clarify whether the July 5, 1996 and the July 11, 1996 orders were intended to apply to Respondent and, if so, that he be allowed until the close of business on July 19, 1996 to file his responses, if appropriate, to the motion and the petition.

Dated this 12th day of July, 1996.

THE HONORABLE BRIAN BARNETT DUFF, United States District Judge for the Northern District of Illinois, Respondent.

By: /s/ Steven J. Roeder
One of its Attorneys

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In the Matter of James R. EDGAR, Governor of Illinois, and Ann Patla, Director of the Department of Mental Health and Developmental Disabilities, Petitioners,

v.

K.L., et al., Respondents.

No. 96-2641.

United States Court of Appeals,
Seventh Circuit.

Submitted July 15, 1996.

Decided July 18, 1996.

Order Denying Rehearing and Rejecting Rehearing En Banc Aug. 14, 1996.

Joel G. Chefitz, Timothy J. Patenode, Katten, Muchin & Zavis, Chicago, IL, for Petitioners.

Steven J. Roeder, Hedlund & Hanley, Chicago, IL, for Respondent.

Harvey M. Grossman, Roger Baldwin Foundation of ACLU, Inc., Chicago, IL, for Parties-in-Interest.

Before CUMMINGS, BAUER, and EASTERBROOK, Circuit Judges.

PER CURIAM

Plaintiffs in this class action contend that the mental health care system of Illinois violates the Constitution of the United States. With the consent of the parties, the district judge appointed a panel of three experts to investigate the state's institutions and programs. The panel's charge permits its members and aides to meet with patients and state employees outside the presence of

counsel, for otherwise they could not collect reliable data. Later the panel began to meet in private with the judge, without such a compelling reason. When defendants learned that one of these meetings, which lasted 3 1/2 hours on September 7, 1994, was dedicated to giving the judge a preview of the panel's conclusions, and to persuading the judge that the panel's methodology was sound, defendants asked the judge to disqualify himself under 28 U.S.C. § 455. The judge declined, and this petition for a writ of mandamus followed.

Plaintiffs believe that the defendants waited too long (trial is set for next month) to seek disqualification. Delay can be fatal, although after *Liljeberg v. Health Service Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), passage of time is not conclusive if the justification for disqualification is compelling. Compare *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir.1985), with *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-18 (7th Cir.1977) Although the defendants have known for at least a year that the experts met from time to time with the judge, the judge described these occasions as administrative and "social". Not until two weeks before seeking disqualification did the defendants learn – by acquiring a detailed agenda prepared by one of the panel members – that at least one meeting had covered the merits of the case, rather than casual chitchat and details such as reimbursement of expenses. Defendants sought to learn more about what had happened at the September 7 meeting, but the judge forbade inquiry. He quashed subpoenas issued to the participants, and he invoked what he called a "judicial privilege" to shield what had been said. Thus all we have are possibilities. But these possibilities justify

a request for emergency relief. See *United States v. Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir.1985); *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir.1985). Indeed, we have held, parties who know of a problem under § 455 but permit the trial to occur may not seek relief later. *Murphy*, 768 F.2d at 1539-41. Defendants' request is timely.

Whether the meeting was a disqualifying event depends on what transpired. Canon 3A(4) of the Code of Conduct for United States Judges provides: "A judge should . . . except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Did any meeting between judge and experts touch the merits, or procedures affecting the merits? We cannot know, because the district judge has blocked discovery from other participants and has declined to state on the record his own memories of what happened. The judge did not elaborate on the nature, extent, or legal support for his claim of "judicial privilege," but a phrase of that kind usually refers to the deliberative process. No privilege covers arrangement of administrative details, such as where an expert witness will stay while doing research or who will provide computer time to analyze the data. To invoke a privilege is therefore to confess that the discussions covered the substance of potential testimony and the conduct of the litigation – and if this is not so in fact, it is nonetheless what we must assume, because no evidence in the record undermines the inferences naturally to be drawn from the outline for the September 7 meeting. The outline enumerates "three irreducible obligations of the modern state

hospital" and ticks off (in a section captioned "General Findings") numerous ways in which the panel believes Illinois falls short. This outline covers subjects at the core of the litigation; indeed, it served the panel as the draft outline for its final report.

Defendants believe that a private briefing on the merits leads to disqualification under 28 U.S.C. § 455(b), which provides that a judge must "disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding". Defendants contend that the experts imparted to the judge "personal knowledge of disputed evidentiary facts". Plaintiffs have two replies: first, that the private meetings were authorized by the parties' consent reflected in the agreed order appointing the panel; second, that disclosures in chambers are not "personal" knowledge. Neither of these is sound.

Let us suppose that the parties consented to private investigation by the judge. That consent would be ineffectual under 28 U.S.C. § 455(e): "No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)." What is more, there was no such consent. Early drafts of the order appointing the experts and a professor of law who was called "the Manager" provided that "[t]he Panel and Manager may communicate with the Court at any time without the inclusion of counsel." This language was deleted before the order was entered. According to plaintiffs, it was deleted as redundant in light of ¶ 3 of the order, which reads:

> (a) The Manager and the [Manager's] Assistant shall coordinate and facilitate the investigation and reports of the Panel. In addition to the other duties specifically stated in this Order, the Manager and the Assistant will obtain and coordinate access for the Panel to DMHDD [Department of Mental Health and Developmental Disabilities] mental health centers and other facilities, programs and agencies, facilitate the Panel's collection of other information, facilitate communication between Panel members, as requested, make travel and lodging arrangements for the Panel, and report to the Court and the parties as to the progress and status of the Panel's investigation.
>
> (b) By appointing the Manager, the Court is not relinquishing its exclusive prerogative to instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report.

Paragraph 3(a) permits the Manager to "report to the Court and the parties", not to report to the judge in secret, and it does not even hint that the experts (who were likely to become witnesses) may meet privately with the judge. Paragraph 3(b), on which plaintiffs lay principal stress, states that the judge may direct the experts, but again it does not say or imply that the judge may receive information and deliver instructions in secret. Rule 706(a) of the Federal Rules of Evidence specifies the right way: "A witness so appointed [by the court] shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate."

This places the substance of the instructions on the record and ensures that the parties know what is happening and can make appropriate suggestions, motions, and objections. The judge has not attempted to reconcile with Canon 3A(4) or Rule 706(a) the procedure he used in this case.

As for the question whether information secured in chambers can be "personal" knowledge: although § 455 is principally concerned with knowledge that is "extrajudicial" in the sense that the judge acquires it outside a courthouse, see *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), the Court rejected the argument that *only* such information can lead to disqualification. *Id.* at ___, 114 S.Ct. at 1157. The point of distinguishing between "personal knowledge" and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." Thus information a judge learns at a workshop devoted to a subject is extrajudicial, *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir.1992); *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36, 41 & n. 4 b(4th Cir.1995), even though the workshop is open to other persons, and evidence could be taken about the proceedings. Off-the-record briefings in chambers, by contrast, leave no trace in the record – and in this case the judge has forbidden any attempt at reconstruction. What information passed to the judge, and how reliable it may have been, are now unknowable. This is "personal" knowledge no less than if

the judge had decided to take an undercover tour of a mental institution to see how the patients were treated. Instead of going himself, this judge appointed agents, who made a private report of how they investigated and what they had learned. Mandatory disqualification under § 455(b)(1) follows.

Bradley v. Milliken, 620 F.2d 1143, 1157 (6th Cir.1980), on which plaintiffs rely, is not to the contrary. That case did not deal with § 455(b)(1) and did not approve *ex parte* meetings with expert witnesses scheduled to testify at trial; instead the court addressed a post-trial meeting between the judge and a political body that would be charged with implementing the relief. Even so the court denied a motion for disqualification under 28 U.S.C. § 455(a) only because it applied a rule limiting disqualification to extrajudicial activities – a rule the Supreme Court has since disapproved.

Although an over-strict reading of § 455(b)(1) could lead to injustice by disqualifying a judge for learning a trivial fact in mid-trial of an extended case, the activities here do not present that specter. The discussions in chambers were calculated, material, and wholly unnecessary. Indeed, we believe that disqualification is independently required by 28 U.S.C. § 455(a), which provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A thoughtful observer aware of all the facts (the standard under § 455(a), see *Liljeberg*, 486 U.S. at 865, 108 S.Ct. at 2205; *In re Mason*, 916 F.2d 384 (7th Cir.1990); *In re National Union Fire Insurance Co.*, 839 F.2d 1226 (7th Cir.1988); *New York City Housing Development Corp. v. Hart*, 796 F.2d 976 (7th

Cir.1986)), would conclude that a preview of evidence by a panel of experts who had become partisans carries an unacceptable potential for compromising impartiality.

By September 1994 the panel's two remaining experts were loudly denouncing Illinois' mental health system. By their own admission, the members of the panel decided to use an unorthodox approach, potentially open to challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2286, 125 L.Ed.2d 469 (1993). Methodology was among the subjects of the private meetings, and an objective observer would be concerned that the judge had given the panel's procedure his blessing, in secret and without adversarial input. After defendants filed their motion for disqualification, the judge justified his meetings with the panel precisely on the ground that the meetings would enable him to ensure that the panel's report was admissible – that is to say, the judge offered as justification for an *ex parte* meeting the need to anticipate and preempt an important legal question. Although in open court the judge assured defendants that he would have an open mind if they later pressed a *Daubert* objection, an objective observer would doubt that this opportunity was adequate – for defendants would be challenging the judge as well as the panel.

Other proceedings lend credence to a concern that the judge and the experts became excessively cozy as a result of these meetings. For example, the judge has expressed confidence that the panel's report is invulnerable to challenge. When defendants asserted that the

panel's report contains conclusions about which reasonable persons could differ, the judge replied: "There are no conclusions in that report" and gave some examples, including this one:

> Then [the report] says: "(1) An ubiquitous lack of sophisticated clinical leadership that could have assisted the staff in addressing the internal issues that were torturing their patients and that often led to repeated hospitalizations." That's an assertion of fact.

Although the judge saw only "fact" in this passage, we see one conclusion piled on another. Was the clinical leadership "unsophisticated"? Could "sophisticated clinical leadership" have done anything about the "internal issues that were torturing [the] patients"? Would better treatment have reduced the number of repeated hospitalizations? These propositions, and the methodology that led to them, may be contested at trial. But the judge has announced that they are incontestable.

Additional statements by the judge also would cause a reasonable observer to be seriously concerned about the court's ability to conduct the trial impartially. For example, in July 1995 the Mental Health Association of Illinois (MHAI), an advocacy group, sent the judge a letter expressing its opinion that the state's facilities and programs needed immediate improvement, and asking the judge to release the panel's report to the public so that it could be used in lobbying efforts. MHAI sent a copy of this letter to plaintiffs' counsel, but not to defendants' counsel. After consulting the Manager, the judge replied with a letter that reads, in part: "In due time, we hope we will achieve some significant results." A reasonable

observer would hear this as an assertion – long in advance of trial – that the state's institutions and programs violate the Constitution, and that a remedial order is forthcoming. The judge sent his letter to MHAI, to plaintiffs' counsel, and to a lobbyist; defendants' counsel was left in the dark.

So convinced was the judge of the merit of plaintiffs' case that he demanded significant concessions in settlement negotiations. The judge was dismayed that the persons negotiating on behalf of the defendants did not include the Governor of Illinois. The judge told counsel for defendants that they had to produce high executive officials, because even the Director of the DMHDD does not "really know how bad things are." The judge assured counsel that the Governor would be well received although "when the Governor knew me, he was a gofer in the [state] Legislature and I was a very active and vocal legislator." When the Governor declined to attend the settlement negotiations, the judge inquired:

> Do you know how many cases that I have in this courtroom right now that the Governor is very, very concerned with? Do you?
>
> [Counsel]: I imagine a few.
>
> The Court: Well, you're supposed to be responsible for everyone who wants to talk to the Governor. You should know that the recent revenue bill is up here for a preliminary injunction within weeks, including hundreds of millions of dollars, they tell me, or many millions of dollars of revenue to the state of Illinois. Does that mean that I'm not important to the Governor or that somehow or other I'm being pretentious?

A month later, court and counsel had this exchange:

> [Counsel]: Your Honor, the governor cannot afford to set a precedent of getting involved personally in every case in which he is named in his official capacity. He told me, and I have never counted it up, that there are hundreds, if not thousands, of such cases.
>
> The Court: I know that counsel, and I don't think there are three that are more important than this one, and I probably have the other two. Maybe there are other judges that have them. But the point is this is a massively important case to the people of Illinois, okay? Now, the governor is the governor of Illinois and he is being sued. You say it's only in his official capacity. Okay, in his official capacity I want to talk to him. Now, if I have to, I'll subpoena him and I'll set a precedent, okay? And if nothing else, I'll insist that he be a witness in this courtroom if I don't get to talk to him, and then I will ask him questions under oath in the courtroom.

The judge relented after recognizing that he lacks authority to hale the Governor into court. (No one contends that the Governor is a fact witness.) But a reasonable observer could read these exchanges as veiled threats to decide not only this case, but also other pending cases, against the State of Illinois as a penalty for the Governor's unwillingness to appear. An inclination to retaliate when crossed also is manifest in the comment that defendants would be in "deep doo" if the motion for disqualification failed. The impartiality of a judge who makes such statements may reasonably be questioned, whether or not the judge planned to carry through.

What we have seen in this record persuades us not only that the district judge is disqualified, but also that the panel can no longer claim the mantle of judicial appointment. The panel has been influenced by secret submissions from advocacy groups and counsel supporting plaintiffs in other litigation against Illinois. One of the two remaining experts on the panel, Dr. Robert L. Okin, has shed any pretense that he is playing a scientific role. In a letter to the district judge dated December 7, 1995, Okin asked the judge to release the panel's report so that it could serve as a "flag for advocacy groups to rally around to assert [political] pressure." (Copies of this letter were not sent to counsel.) Okin urged the judge to delay release of the report for a short time, however, because "[i]f the report is released immediately, we won't have time to meet with key editorial boards before it hits the street. Imparting an understanding of this Report to these boards is crucially important. This fight needs to be won on the street, not just in court." The letter continued:

> By the way, the legislatures' anger about consent decrees is standard fare. No legislature likes them but with the right approaches, even the most reluctant legislatures have put up the money. How loudly they gnash their teeth is irrelevant. Whether they pay is the only relevant issue. If the system is viewed as deficient and this is highly publicized, legislatures will pay, whatever the niceties of the balanced [sic] of powers.

Okin may be an expert on mental health, but he is no expert on the difference between judges and legislators, the proper relation between national and state governments, or the "niceties of the balanced of powers." See

Evans v. Chicago, 10 F.3d 474 (7th Cir.1993) (en banc); *B.H. v. McDonald*, 49 F.3d 294, 302-04 (7th Cir.1995). Experts appointed and supervised by a court carry special weight because of their presumed neutrality. Okin is no neutral, and neither is the panel. We leave to the discretion of the replacement judge whether plaintiffs may call members of the panel as their own witnesses, and introduce its report as their evidence, or whether the behind-the-scenes machinations make even that use imprudent.

A writ of mandamus will issue today removing the current district judge from the case and requiring its assignment to a different judge. Ancillary questions, such as whether we should stay proceedings pending the disposition of the petition for mandamus, need not be resolved.

Order

The court treats the Suggestion for Rehearing En Banc, filed on August 1, 1996, by the judicial respondent in these proceedings, as implying a petition for rehearing by the panel. See Circuit Rule 35(c). All of the judges on the panel have voted to deny the petition. The panel notes that the judicial respondent could have filed a response to the petition for mandamus on the same schedule as the private respondent, and did not do so. His position, stated at length in an opinion denying the motion under 28 U.S.C. § 455, was fully considered by the panel.

No judge in active service has called for a vote on the suggestion of rehearing en banc, which is rejected. Circuit

Judge Flaum did not participate in the consideration or decision of this case.

No. 96-2641
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JIM EDGAR, Governor of the State of Illinois and ANN PATLA, Director of the Department of Mental Health and Developmental Disabilities,	)	No. 92 C 5722
Petitioners,	)	Honorable Brian Barnett Duff
vs.	)	
THE HONORABLE BRIAN BARNETT DUFF, United States District Judge for the Northern District of Illinois, K.L., L.F. and R.B. on behalf of themselves and all persons similarly situated,	)	
Respondents.	)	

AFFIDAVIT OF NORVAL MORRIS

I, Norval Morris, being first duly sworn, depose and state as follows:

1. I am the Julius Kreeger Professor of Law & Criminology, Emeritus, at The University of Chicago School of Law. I make this affidavit based on my personal knowledge and in support of the Suggestion for Rehearing *En Banc* of this Court's July 18, 1996, *per curiam* opinion ("Opinion") filed by the Honorable Brian Barnett Duff. If

called as a witness in this matter, I would testify consistently with this affidavit.

2. Pursuant to an agreed order ("Agreed Order") of the parties entered by the District Court on November 10, 1993, in this case, I have served as the Manager for a panel of experts commissioned to investigate the practices, programs and policies of the Illinois Department of Mental Health & Developmental Disabilities. A copy of this order is attached as Exhibit A.

3. On August 10, 1994, the panel, the Director of the defendant Department, two of her senior assistants, counsel for both plaintiffs and defendants, the Inspector General of Mental Hospitals, the liaison officer in this case, Dannia Southerland and I met for two and one half hours to discuss a wide variety of topics relevant to the litigation, including a briefing on the expert's progress and their tentative, general findings thus far. At this meeting, it was decided that the experts would visit all state mental hospitals and that they would be more adequately briefed on the current reforms the Department was pursuing.

4. Immediately after this meeting, the panel and Dannia Southerland decided to make a similar progress report to the District Court. My monthly report to the District Court dated September 8, 1994, informed the District Court and counsel for both parties that "it was decided by the Panel and Dannia Southerland that we should seek an opportunity, early in September to make a similar progress report to you [the District Court]." A true and accurate copy of this letter is attached as Exhibit B. This meeting occurred on September 7, 1994.

5. I was present at the September 7, 1994, meeting attended by the District Court, the members of the court-appointed expert panel, and Dannia Southerland. At this meeting, there was no discussion of any substantive aspect of the experts' report other than what was disclosed to the parties in my correspondence of September 8, 1994. The meeting was not designed to provide the district court with an opportunity to "preview" the panel's conclusions or the merits of the case. Indeed, no person at this meeting raised or commented on the substance of potential testimony or the conduct of the litigation.

6. On October 12, 1994, I again disclosed to both parties the time and content of this meeting, stating as follows:

> This is my report to you in *K.L. v. Edgar* for the month of September, 1994; I have not sent a draft for comment in advance to counsel to the parties, but copies will be sent to them.
>
> The two experts on the panel had lengthy discussions with the current and previous directors of the defendant department who proved to be cooperative and helpful in assisting the experts . . . . These meetings . . . followed the meeting with you on September the 7th of the panel and Dannia Southerland. Both meetings were, I am informed by the two experts, of great assistance to them in their work for the Court.
>
> Otherwise, the month was devoted to drawing together the material for the panel's report to you, including interviews with the investigators to confirm the panel's understanding of the data they have collected. . . .

> This letter has little content, mainly because of the meetings between you and the panel on September 7, and you and me on September 23 which together leave me little to write about that would not be burdensomely repetitive.

Pet. App. IV (L). A true and accurate copy of this letter is attached to this affidavit as Exhibit C. Had either party requested any clarification or additional information regarding the September 7 conference, I would have been happy to provide that information, orally or in writing, in a timely fashion.

7. To my knowledge, the defendants knew throughout the last three years that the expert panel was meeting periodically with the District Court.

8. I have read this Court's Opinion in the above-entitled case granting the petition and issuing a writ of mandamus. Contrary to one assumption the Opinion makes, I did not discuss with the District Court a letter sent by the Mental Health Association of Illinois ("MHAI") to the District Court in July, 1995, referenced on page 8 of this Court's *per curiam* slip opinion. Moreover, I did not consult with the District Court, nor did it seek my counsel, regarding its subsequent reply to the MHAI letter. I was first informed of this correspondence after the District Court mailed its July 28, 1995, reply and a copy to me. A true and accurate copy of the District Court's letter that I received is attached as Exhibit D.

FURTHER AFFIANT SAYETH NOT.

/s/ Norval Morris

SUBSCRIBED AND SWORN TO

this 31st day of July

/s/ Joyce I. Wilson
[SEAL]

[Exhibit A]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

K.L., *et al.*, Plaintiffs,	)	No. 92 C 5722
v.	)	Honorable Brian Barnett Duff
JIM EDGAR, *et al.*, Defendants.	)	

AGREED ORDER TO APPOINT EXPERT WITNESSES

(Docketed Nov. 10, 1993)

This Court, with the agreement of the parties, enters this order to appoint expert witnesses to a court-appointed panel of experts pursuant to Rule 706 of the Federal Rules of Evidence.

Identity of Panel and Manager

1.(a) Pursuant to the parties' mutual submission and nomination, the Court hereby appoints these three impartial nominees as its Panel of Experts (Panel).

Leona L. Bachrach, Ph.D.
Martha B. Knisley, M.A.
Robert L. Okin, M.D.

(b) The Court also appoints Norval Morris, LL.D. to act as the manager of the Panel (Manager), and Judith S. Cottle to act as the Manager's assistant (Assistant).

Scope of the Panel's Commission

2.(a)(i) The Panel shall investigate the practices, programs and policies of the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) pertinent to conditions of care and treatment of mentally ill persons in the custody of these twelve DMHDD facilities: Singer Mental Health and Developmental Center, Elgin Mental Health Center, Chicago-Read Mental Health Center, Madden Mental Health Center, Illinois State Psychiatric Institute, Tinley Park Mental Health Center, Zeller Mental Health Center, Meyer Mental Health and Development Center, McFarland Mental Health Center, Alton Mental Health and Development Center, Chester Mental Health Center and Choate Mental Health and Developmental Center. After investigating these practices, programs and policies, the Panel shall draft a report pursuant to Paragraph 7, 8 and 9 below explaining in detail its opinions as to whether or not the practices, programs and policies concerning: (1) health and mental health care and treatment; (2) use of restraints, seclusion and other restrictive measures; (3) physical and environmental conditions, including safety and sanitation, represent a substantial departure from professionally accepted minimum standards, practices and judgments. The Panel's report shall also advise the Court as to any other facts or matters that the Panel finds, or the Panel believes the Court will find, significant in the consideration of the Panel's opinions.

(ii) Should the parties advance to the Court a proposal for the settlement of this action, the Court may then require the Panel to advise it as to the merits of such

proposal. Likewise, should the Court determine, subsequent to the Panel's report, that any due process violation exists, defendants shall have an opportunity to propose the remedy for such violation and the Court may then require the Panel (and plaintiffs' representatives) to advise it as to the merits of defendants' proposal. The format for the Panel's advice on these topics shall be left for further order of this Court.

(b) In order to fulfil its duties under Paragraph 2(a) above, the Panel may undertake any of the following:

(i) The Panel may undertake any activities directed at obtaining information which is of a type reasonably relied upon by professionals in the field of mental health care in evaluating the adequacy of conditions of care and treatment in mental health care facilities.

(ii) The Panel may gather information regarding any of the DMHDD mental health centers, interview staff, interview patients and their families on a voluntary basis, attend treatment team meetings, and review any documents, including individual patient records, in the custody or control of DMHDD that the Panel deems pertinent to the exercise of its duties. The Panel or the Manager shall ordinarily provide prior notice to the parties of any visits to DMHDD mental health centers. However, if the Panel concludes that in fulfilling its obligations it should conduct any visits without prior notice, it may do so.

(iii) The Panel may also gather information regarding any facility, program or agency whose activities are pertinent to conditions of care and treatment in the DMHDD mental health centers, including any facility,

program or agency that receives funds from DMHDD for the provision of services to the mentally ill. The Panel shall visit such facilities, programs and agencies only with the prior consent of the director or official in charge thereof and with prior notice to both parties. The Panel may also interview, on a voluntary basis, staff and recipients of services at any such facilities, programs or agencies. The Panel shall preserve the confidentiality of all mental health service recipients observed, contacted or identified through this process.

Scope of the Manager's Commission

3.(a) The Manager and the Assistant shall coordinate and facilitate the investigation and reports of the Panel. In addition to the other duties specifically stated in this Order, the Manager and the Assistant will obtain and coordinate access for the Panel to DMHDD mental health centers and other facilities, programs and agencies, facilitate the Panel's collection of other information, facilitate communications between Panel members, as requested, make travel and lodging arrangements for the Panel, and report to the Court and the parties as to the progress and status of the Panel's investigation.

(b) By appointing the Manager, the Court is not relinquishing its exclusive prerogative to instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report.

Retention of Additional Consultants

4. The Panel may retain, with the prior approval of the Court, the professional services of additional consultants as it deems necessary. Prior to the retention of each additional consultant, the Panel shall provide the Manager with the name and resume of the proposed consultant and the reasons for seeking his or her retention. The Manager shall then advise the parties and the Court of such request by delivering to them a letter containing such information. In the event that any party objects to the retention of the proposed consultant, that party shall file a motion with the Court within ten calendar days after receipt of the letter, serve the motion upon the other party and the Manager in accordance with applicable court rules, and promptly seek resolution of that motion thereafter; otherwise any such objection is waived. The Manager shall be responsible for providing each such consultant with a copy of this Order, and advising them to review it. This Order will bind each consultant in like manner as the Panel.

Parties' Access to Information From and Communications With the Panel and Manager

5.(a) Except as provided in subparagraph (b), any and all information provided to the Panel, its consultants or the Manager shall be available to the parties' counsel upon request. All information provided to the Panel, its consultants or Manager shall be kept strictly confidential by the Panel, the consultants and the Manager and shall not be made public at any time sooner than the tenth calendar day after delivery to the Court and the parties of

the final report described in paragraph 8 below. In like fashion, until said tenth calendar day after delivery of the final report, all information provided by plaintiffs to the Panel, its consultants or the Manager shall be kept confidential and shall not be made public by the defendants; and until said tenth calendar day after delivery of the final report, all information provided by the defendants to the Panel, its consultants and the Manager shall be kept confidential and shall not be made public by plaintiffs. And in like fashion, until the tenth calendar day after delivery of the final report, all work product and communications (except those of an administrative nature) of the Panel, its consultants and the Manager shall be kept confidential by the Panel, the consultants, the Manager and the parties shall not be made public. If either party shall file a motion prior to the expiration of the tenth calendar day to keep confidential all or part of any such information, work product or communication, same shall be kept confidential until the Court shall have ruled on the motion. Notwithstanding the foregoing sentence, the Panel, its consultants, the Manager and plaintiffs shall not disclose, even after said tenth calendar day, any of the documents defined below as "Medical Records" or any information derived from those records that would disclose or tend to disclose the identity of any recipient of mental health services or any therapist. Notwithstanding the foregoing paragraph, each party may disclose to any consulting expert any information provided to the Panel or any work product or communication of the Panel, provided that each such expert shall first agree in writing to maintain such information, work

product or communication in strict confidence in accordance with this order. The confidentiality obligations of this Paragraph 5(a), shall not apply to any information already in the public domain or any information obtained from other, non-confidential sources. For the purposes of this paragraph 5(a), the term "Medical Records" shall be defined as follows:

(x) Any record kept by a therapist (psychiatrist, physician, psychologist, social worker or nurse or any other person providing mental health services), or by an agency in the course of providing mental health services to a recipient, concerning the recipient and the services provided; or

(y) Any communication made by a recipient or other persons to a therapist, or to or in the presence of other persons, during or in connection with providing mental health services to a recipient.

(b) If the Panel concludes it would assist in the performance of its duties to conduct any interview with a non-defendant in confidence, the Panel shall be permitted to withhold the identity of the interviewee. If information received from an interviewee could reasonably lead to identification of the interviewee, the Panel shall be permitted to limit dissemination of that information to the Court and to counsel for the parties, who shall not further disclose it without leave of Court. Information from unidentified sources shall not be the sole basis of any opinion presented in the Panel's report. The Court may require the Panel to disclose to it *in camera* the identity of any unidentified sources.

(c) Until the issuance of the Panel's final report pursuant to paragraph 8 below, neither plaintiffs nor defendants shall conduct any independent discovery, except with leave of Court.

6.(a) The Panel and its consultants shall each make a good faith effort to include counsel for both plaintiffs and defendants in any conversation that they or any individual member of the Panel initiates with counsel for either party. If the Panel or a consultant is unable in good faith to include counsel for both parties in any such conversation, the participating counsel shall promptly provide the absent counsel with a written summary of the conversation. "Good faith" in this context shall be deemed to require, among other things, that such conversations be delayed until the excluded counsel is available, unless the conversation is of such an emergency nature that it cannot be so delayed without substantial prejudice to the investigation. Counsel for either party may initiate a conversation with the Panel or a consultant only if opposing counsel is included; and if opposing counsel is unavailable, such conversation shall be deferred until they are available. Copies of all written communications with the panel or any consultant, known and available to any attorney, shall be provided contemporaneously to opposing counsel, except that the names of persons whom a party proposes that the Panel interview in confidence, as described in Paragraph 5(b) above, may be redacted from the copies of any such written communications provided to opposing counsel.

(b) Counsel for the parties ordinarily will not communicate with the Manager without including opposing

counsel. However, the Manager may accept communications from, or initiate communications to, counsel for one party without including counsel for the other party (*ex parte* communications) if the Manager determines that such communications may be of assistance to the Panel if held *ex parte*. If the Manager intends to communicate *ex parte* with counsel for a party, the Manager shall notify counsel for the other party of the general character of the communication before, or if not appropriate to do so, reasonably promptly after the *ex parte* communication. Similarly, if a party intends to communicate *ex parte* with the Manager, the party will notify counsel for the other party of the general character of the communication before, or if not appropriate to do so, reasonably promptly after the *ex parte* communication. In every case, the Manager shall disclose to the opposing counsel such contents of the *ex parte* communication as the Manager deems appropriate in the exercise of his best judgment.

Preparation of the Panel's Report

7. The Panel shall, in accordance with paragraph 2(a)(i) above, submit to the parties a draft report of its opinions and bases therefore. The Panel shall prepare that draft report within such timetable as the Court shall approve. The Panel shall, as soon as possible following entry of this Order, determine a proposed timetable for preparation of the draft report and shall submit that timetable to the Manager, who after consultation with the parties, shall submit it to the Court for approval. The Panel and the parties shall keep the draft report strictly confidential and shall not make it public at any time prior to trial. The Panel shall thereafter meet jointly with the

parties to discuss and consider their views regarding the draft report; and the parties in anticipation thereof or thereafter may submit to the Panel any written comments (with notice and a copy to the other party) they may have regarding the draft report. The Panel and the parties shall keep any such written comment strictly confidential and shall not make them public at any time prior to trial. At trial, the Panel and the parties shall continue to keep the draft report and all comments thereto strictly confidential unless the Court otherwise orders. Notwithstanding the foregoing, each party may disclose to its consulting experts the draft report and all comments of any party, provided that each such expert shall first agree in writing to maintain the draft report and comments in strict confidence in accordance with this order.

8. After receipt and consideration of the views and comments of the parties, the Panel shall be responsible for preparing and submitting a final report to the Court and the parties. The final report shall be kept confidential by the parties until, and shall not be made public by any party or the Panel sooner than, the tenth calendar day after its delivery to the Court and the parties. If either party shall file a motion within those ten days to keep the report confidential, the final report shall be kept confidential until the Court shall have ruled on the motion.

9. The Panel's report shall be based upon information that is of a type reasonably relied upon by professionals in the field of mental health care in evaluating the adequacy of conditions of care and treatment in mental health care facilities and systems. The Panel shall secure

factual information that is sufficient in quality and quantity competently and professionally to discharge its duties.

10. No party shall be bound by any of the opinions contained in any report of the Panel. The parties may meet at any time to negotiate a settlement of this action.

Compensation of the Panel

11.(a)(i) Until such time as costs would be awardable under Federal Rule of Civil Procedure 54(d), the parties shall jointly compensate and finance the work of the Panel, its consultants and the Manager. The parties shall, within 60 days of the entry of this Order, each deposit $50,000 into an account held by the Clerk of the United States District Court for the Northern District of Illinois ("Court Account"), which shall be within the sole control of the Court. The Manager shall at the same time open an account at Midtown Bank in the name of "Manager Norval Morris Special Account" with the Manager and the Assistant as co-signatories ("Manager Account"). The Manager shall request the Court to transfer funds from the Court Account to the Manager Account pursuant to paragraph 11(b) below. If the Court Account shall become depleted, the parties shall make additional equal deposits in amounts as they may agree on or as the Manager may suggest, so that during the pendency of the litigation plaintiffs shall pay one-half of the total cost of the compensation and expenses for the Panel, its consultants and the Manger, and defendants shall pay one-half of such total cost. If any party shall object to further

deposits, a party may move the Court to order the parties to make further equal deposits as appropriate.

(ii) Thereafter, the parties may agree to a reallocation of the funds expended for said compensation and expenses. In the event the parties cannot agree, either party may request the Court, in accordance with applicable court rules, to order that all or a portion of the funds deposited by a party into the Court Account be charged against the opposing party as costs as provided by Fed. R. Evid. 706(b).

(b) The Panel, its consultants and the Manager shall receive fair compensation for their professional services and reasonable expenses, including the cost of reasonable clerical support and the Manager's reasonable use of the Assistant. On a monthly basis, the Panel and its consultants shall submit invoice of their fees, together with an itemization of time spent and activities undertaken. The Manager shall consult with the Panel regarding their invoices, as appropriate, but otherwise will deliver those invoices as well as his own invoice to the parties within a reasonable time thereafter and shall request the Court to transfer from the Court Account to the Manager Account funds sufficient to pay such invoices. If any party shall object to payment of all or part of any invoice, it shall file a motion with the Court within ten calendar days after receipt of the invoices, serve the motion upon the other party and the Manager in accordance with applicable court rules and promptly seek resolution of the motion; otherwise all objections are waived and the Manager is authorized to disburse payment from the Manager Account to each Panelist and consultant and to himself.

The Manager is authorized to pay expenses of any Panelist or consultant upon request, provided that those paid expenses are reported on a monthly basis with the fee invoices.

Subsequent Modification of the Order

12. The terms of this order may be modified or revised by further order of this Court, upon the Court's own motion after notice and hearing, or upon good cause shown by any party.

Enter:

/s/ Brian Barnett Duff
UNITED STATES
DISTRICT JUDGE

Approved by:

/s/ Benjamin Wolf
Attorney for Plaintiffs

/s/ Timothy Patenode
Attorney for Defendants

[Exhibit B]

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO ILLINOIS 60637-2786

Norval Morris
Julius Kreeger
Professor of Law and Criminology, Emeritus

Tel: (312) 702-9587
Fax: (312) 702-0730

September 8, 1994

The Honorable Brian Barnett Duff
U.S. District Court for Illinois
U.S. Courthouse
219 S. Dearborn (#2378)
Chicago, IL 60604

Dear Judge Duff:

This is my report to you in *K.L. v. Edgar* for the month of August, 1994; I have not sent a draft for comment in advance to counsel to the parties, but copies will be sent to them.

I was less involved in this case during August than during earlier months, having been out of town for the period August 9 to August 27. During this period I arranged that I could be contacted were any action of mine necessary in *K.L. v. Edgar*, but I proved readily dispensable.

August was, however, a busy and productive month for the experts and their team of investigators, with many visits to mental hospitals and community-based care providers, and with continuing intensive investigations of the patients being followed.

On the tenth of August there was a two and a half hour meeting at which the experts gave a briefing on the progress and tentative, general findings of their study so far. Attending this meeting were the Director of the defendant Department and two of her senior assistants, counsel to the parties, the Inspector General of Mental Hospitals, the liaison officer in this case, the Panel, and Dannia Southerland (thirteen in all). A wide variety of topics bearing on this litigation was discussed and it was decided that the experts would visit all the State Mental Hospitals and that they would be more adequately briefed on the current reforms being pursued by the department. All in all, it was a useful and co-operative meeting.

Immediately after this meeting it was decided by the Panel and Dannia Southerland that we should seek an opportunity, early in September to make a similar progress report to you.

Sincerely,

/s/ Norval Morris
Norval Morris

cc: Joel Chefitz, Esq.
Susan Jardine, Esq.
Thomas Finnegan
Harvey Grossman, Esq.
Timothy Patenode, Esq.
Benjamin Wolf, Esq.

[Exhibit C]

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO ILLINOIS 60637-2786

Norval Morris
Julius Kreeger
Professor of Law and Criminology, Emeritus

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October 12, 1994

The Honorable Brian Barnett Duff
U.S. District Court for Illinois
U.S. Courthouse
219 S. Dearborn (#2388)
Chicago, IL 60604

Dear Judge Duff:

This is my report to you in *K.L. v. Edgar* for the month of September, 1994; I have not sent a draft for comment in advance to counsel to the parties, but copies will be sent to them.

The two experts on the panel had lengthy discussions with the current and previous directors of the defendant department who proved to be cooperative and helpful in assisting the experts to a broad perspective on the social, financial and political pressures on the department. These meetings between the two experts and the two directors, followed the meeting with you on September the 7th of the panel and Dannia Southerland. Both meetings were, I am informed by the two experts, of great assistance to them in their work for the Court.

Otherwise, the month was devoted to drawing together the material for the panel's report to you, including interviews with the investigators to confirm the panel's understanding of the data they have collected. There were also several visits to mental hospitals and to community based mental health providers and several meetings with leaders of community mental health interest groups.

This letter has little content, mainly because of the meetings between you and the panel on September 7, and you and me on September 23 which together leave me little to write about that would not be burdensomely repetitive.

Sincerely,

/s/ Norval Morris

cc: Joel Chefitz, Esq.
Susan Jardine, Esq.
Thomas Finnegan
Harvey Grossman, Esq.
Timothy Patenode, Esq.
Benjamin Wolf, Esq.

[Exhibit D]

UNITED STATES DISTRICT COURT
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Judge Brian Barnett Duff

Telephone
312-435-5541

July 28, 1995

Mr. John Day, Ph.D.
President
Ms. Jan Holcomb
Executive Director
Mental Health Assoc. in IL
150 N. Wacker Dr., Suite 900
Chicago, IL 60606

Dear Ms. Holcomb and Mr. Day,

I think you misunderstood the purpose of the Expert Panel Report in the K.L. v. Edgar lawsuit.

You note, for example, that "the report was completed in late 1994 and has been in the hands of the Governor, state mental health officials and their attorneys for six months." This is not accurate, nor does it reflect the purpose of the report to which you refer. In addition, you say "There has been no official response from the Governor or his mental health director regarding intent to negotiate a consent decree or litigate." The Expert Panel Report was only completed on June 29, 1995, and to my knowledge has never been in the hands of the Governor. An early draft was shared six months ago, another draft was shared three months ago, and no official response at this time has been asked for, received, or intended.

The report was never intended at this stage to be more than a working tool between the parties; the persons who you call "the expert panel" are experts appointed as the court's witnesses.

This entire matter is being handled with great thoroughness and concern on the part of all parties, including the plaintiff's counsel, the defendants' attorneys, the defendants, the experts and the court.

In due time, we hope we will achieve some significant results. In the meantime, I disagree with your feeling that the public or anybody else is entitled to the publication of the expert panel report which is confidential and a working paper for the purpose of either assisting in the negotiation of a consent decree or for possible utilization during trial, if any.

I certainly appreciate you concern, but your request is premature. In short, there are many reasons for not publishing, prematurely, what you call a document. If you are suggesting that this public institution is not accountable I would suggest that you are uninformed. No matter how pure your purpose, it is also political at this juncture and this court does not engage in any way in politics.

The MHAI at this moment has no role, responsibility or rights in this litigation. The document itself when it was prepared with some of the state mental health officials was improperly given to them and they have been told not to publish it.

The court is as concerned as you are. This is a massive undertaking and I would suggest that you give us the

same confidence that we will fulfill our role as we give you that you will fulfill your role.

Sincerely,

/s/ Brian Barnett Duff

cc:
Mr. Richard Lockhart, MHAI
Mr. Benjamin S. Wolf, ACLU

FRAP Rule 21
Federal Rules of Appellate Procedure Rule 21, 28 U.S.C.A.

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF APPELLATE PROCEDURE
TITLE V. EXTRAORDINARY WRITS

Amendments received to 5-16-96

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties

below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

(c) Other Extraordinary Writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) Form of Papers; Number of Copies. All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

< [See also amendment set out after text] >

CREDIT(S)

1996 Interim Update

(As amended Apr. 29, 1994, eff. Dec. 1, 1994.)

< General Materials (GM) - References, Annotations, or Tables >

PROPOSED AMENDMENT TO RULE

< Effective December 1, 1996, absent contrary Congressional action, rule is amended to read as follows: >

< "Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs >

< "(a) Mandamus or Prohibition to a Court: Petition, Filing, Services, and Docketing. >

< "(1) A party petitioning for a writ of mandamus or prohibition directed to a court shall file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party shall also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes. >

< "(2)(A) The petition shall be titled 'In re [name of petitioner].' >

< "(B) The petition shall state: >

< "(i) the relief sought; >

< "(ii) the issues presented; >

< "(iii) the facts necessary to understand the issues presented by the petition; and >

< "(iv) the reasons why the writ should issue. >

< "(C) The petition shall include copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition. >

< "(3) When the clerk receives the prescribed docket fee, the clerk shall docket the petition and submit it to the court. >

< **(b) Denial; Order Directing Answer; Briefs; Precedence.** >

< "(1) The court may deny the petition without an answer. Otherwise, it shall order the respondent, if any, to answer within a fixed time. >

< "(2) The clerk shall serve the order to respond on all persons directed to respond. >

< "(3) Two or more respondents may answer jointly. >

< "(4) The court of appeals may invite or order the trial court judge to respond or may invite an amicus curiae to do so. The trial court judge may request permission to respond but may not respond unless invited or ordered to do so by the court of appeals. >

< "(5) If briefing or oral argument is required, the clerk shall advise the parties, and when appropriate, the trial court judge or amicus curiae. >

< "(6) The proceeding shall be given preference over ordinary civil cases. >

< "(7) The circuit clerk shall send a copy of the final disposition to the trial court judge. >

< **"(c) Other Extraordinary Writs.** Application for an extraordinary writ other than one of those provided for in subdivisions (a) and (b) of this rule shall be made by filing a petition with the circuit clerk with proof of

service on the respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule. >

< "(d) **Form of Papers; Number of Copies.** All papers may be typewritten. An original and three copies shall be filed unless the court requires the filing of a different number by local rule or by order in a particular case." >

ADVISORY COMMITTEE NOTES

1967 Adoption

The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. § 1651. Subdivisions (a) and (b) regulate in detail the procedure surrounding the writs most commonly sought – mandamus or prohibition directed to a judge or judges. Those subdivisions are based upon Supreme Court Rule 31, with certain changes which reflect the uniform practice among the circuits (Seventh Circuit Rule 19 is a typical circuit rule). Subdivision (c) sets out a very general procedure to be followed in applications for the variety of other writs which may be issued under the authority of 28 U.S.C. § 1651.

1994 Amendments

Subdivision (d). The amendment makes it clear that a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of

appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the courts requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

1996 Amendments

In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, e.g., Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

Subdivision (a). Subdivision (a) applies to writs of mandamus or prohibition directed to a court, but it is amended so that a petition for a writ of mandamus or prohibition does not bear the name of the judge. The amendments to subdivision (a) speak, however, about

mandamus or prohibition "directed to a court." This language is inserted to distinguish subdivision (a) from subdivision (c). Subdivision (c) governs all other extraordinary writs, including a writ of mandamus or prohibition directed to an administrative agency rather than to a court and a writ of habeas corpus.

The amendments require the petitioner to provide a copy of the petition to the trial court judge. This will alert the judge to the filing of the petition. This is necessary because the trial court judge is not treated as a respondent and, as a result, is not served. A companion amendment is made in subdivision (b). It requires the circuit clerk to send a copy of the disposition of the petition to the trial court judge.

Subdivision (b). The amendment provides that even if relief is requested of a particular judge, although the judge may request permission to respond, the judge may not do so unless the court invites or orders a response.

The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief. The latter does not create an attorney-client relationship between the party's attorney and the judge whose action is challenged, nor does it give rise to any right to compensation from the judge.

If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those

involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue. Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an amicus curiae to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an amicus may avoid the need for the trial judge to participate.

Subdivision (c). The changes are stylistic only. No substantive changes are intended.

No.___-___

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JIM EDGAR, Governor of the State of Illinois and ANN PATLA, Director of the Department of Mental Health and Developmental Disabilities, Petitioners,	)	No. 92 C 5722
vs.	)	Honorable Brian Barnett Duff
THE HONORABLE BRIAN BARNETT DUFF United States District Judge for the Northern District of Illinois, and K.L., L.F. and R.B. on behalf of themselves and all persons similarly situated, Respondents.	)	

PETITION FOR ISSUANCE OF WRIT OF MANDAMUS DISQUALIFYING DISTRICT JUDGE

Joel G. Chefitz
Timothy J. Patenode
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Suite 1600
Chicago, Illinois 60661-3693
(312) 902-5200
Attorneys for Petitioners

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTEREST

Cause No: ___

Short Title: *JIM EDGAR, et al. v. THE HONORABLE BRIAN BARNETT DUFF*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a governmental party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1:

(1) The full name of every party or amicus the attorney represents in the case:

JIM EDGAR, Governor of the State of Illinois, and ANN PATLA, Director of the Department of Mental Health and Developmental Disabilities

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

KATTEN MUCHIN & ZAVIS

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature: _____

Attorney's Printed Name: Joel G. Chefitz

Date: _____

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INTRODUCTION

The relief sought in this petition is extraordinary, and the State defendants would not have brought this petition unless the circumstances also were extraordinary. By accurately recounting these circumstances, defendants do not mean to impugn the motives of District Court Judge Brian Barnett Duff. But however well-intentioned, Judge Duff's conduct – as measured by the objective facts – mandates his recusal from this case.

Trial judges hear testimony in open court in the presence of both sides; they do not conduct "private screenings" in their chambers with witnesses but without the parties and then pre-approve the pre-screened testimony. Nor do trial judges entertain *ex parte* correspondence concerning the merits of a pending case from advocacy groups closely allied with one side and, rather than notifying both parties of such correspondence, consult *ex*

parte about a substantive response and then respond *ex parte* to the letter with a copy to the attorneys for only one side. Trial judges do not permit themselves to be drawn into a strategic alliance among plaintiffs' counsel, expert witnesses and advocacy groups, with the common goal of exerting political pressure on the Governor of Illinois and key legislative leaders. Yet documents produced to defendants in the two weeks immediately preceding the filing of their Emergency Motion for Recusal, Stay of Proceedings and Continuance of Trial, and disclosures made by Judge Duff after the filing of defendants' motion, reveal that Judge Brian Barnett Duff has committed these and other improprieties in this case. The facts requiring recusal in this case are uncontroverted. Judge Duff should be disqualified.

These improprieties have been uncovered only now, at the eleventh hour before trial, because Judge Duff has thwarted all prior attempts by defendants to obtain disclosures from a panel of court-appointed experts. Judge Duff has hidden behind an inapplicable "judicial work product privilege" to shield his secret communications with these potential trial witnesses. This is despite defendants' entitlement to full expert disclosures as of right under an Agreed Order to Appoint Expert Witnesses, the Federal Rules of Civil Procedure and Federal Rule of Evidence 706, which requires that "[a] witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate."

After defendants pointed out evidence of his partiality, Judge Duff not only has continued to commit

many of the same improprieties, but he has attempted to obstruct any further investigation by defendants. He has tried to manipulate the district court record to exclude evidence of his improprieties, by prohibiting the filing of additional materials in support of defendants' motion and striking those that have been filed. Judge Duff has drawn the curtain on any further disclosure by the court-appointed expert witnesses of their *ex parte* communications with him, going so far as to prohibit any inquiry into the experts' "thought processes" or "work product." And he has kept secret the evidence of improprieties contained in his own files and those of plaintiffs' counsel, allowing only selective disclosure of documents he deemed appropriate. In short, Judge Duff has continued to rule and comment in ways that demonstrate his deep-seated partisan beliefs about this case. Judge Duff's disqualification is necessary.

Though defendants have presented Judge Duff with evidence establishing a clear appearance of partiality, the personal knowledge of disputed evidentiary facts and his bias or prejudice against defendants, the Judge has refused to acknowledge his improprieties. Instead, on July 2, 1996, he denied the motion in an memorandum opinion. A copy of the opinion is attached to this petition. With trial imminent and substantial undecided pretrial motions that go to the heart of Judge Duff's *ex parte* communications, defendants request appellate review by mandamus under 28 U.S.C. § 1651(a) and Rule 21 of the Federal Rules of Appellate Procedure and an immediate stay of all proceedings pending decision.

STATEMENT OF THE CASE

Nature Of Plaintiffs' Claims

This is an injunctive suit on behalf of a broad class of persons "who are or will be institutionalized for mental illness in any one of the twelve mental health centers operated by DMHDD [the Department of Mental Health and Developmental Disabilities] in the State of Illinois." (App. Ex. (I) A ¶ 8.)[1] This class was certified on October 26, 1992. (App. Ex. (I) D.) In the first paragraph of their complaint, plaintiffs allege a claim limited to conditions of care *inside* the State's mental health centers:

> This complaint asserts a civil rights class action pursuant to 42 U.S.C. Section 1983 for declaratory and injunctive relief to redress violations of the United States Constitution *in the twelve mental health centers* operated by defendants in the State of Illinois for persons with mental illness. The named plaintiffs and the class they represent ("plaintiffs") seek to enjoin the continuation of *conditions and practices in these institutions* which violate the plaintiffs' rights to safety, freedom of movement, and adequate medical and psychiatric care and treatment which are protected by the Fourteenth Amendment to the United States Constitution.

(App. Ex. (I) A ¶ 1 (emphasis added).) Later paragraphs of the complaint expand plaintiffs' claims to encompass

---

[1] All record references are to the accompanying four-volume appendix and are abbreviated "App. Ex." The appendices are in four volumes and the volume number is designated by a Roman numeral after the abbreviation.

conditions in the community at large, *outside* the State's mental health centers. (*Id.* ¶¶ 23, 24.)

The Agreed Order Appointing Expert Witnesses

Immediately after filing the complaint, plaintiffs moved for a panel of court-appointed experts under Rule 706 of the Federal Rules of Evidence. (App. Ex. (I) A.) Defendants initially objected. (App. Ex. (I) C.) Hearing the case in Judge Duff's absence, Judge Shadur ordered the parties to consult on the identity of proposed witnesses to submit to Judge Duff. (App. Ex. (I) E.) Thereafter, the parties began to negotiate over an agreed order for the appointment of Rule 706 experts. (*Id.*)

In April 1993, Judge Duff held an in-chambers status conference to discuss the parties' draft of the agreed order. (App. Ex. (I) F.) In the course of that conference, the Judge invited the parties to submit "instructional materials" providing an overview of the constitutional principles implicated in the litigation. (*Id.*) Defendants' submission explained that plaintiffs' claims under the Fourteenth Amendment were not absolute but were both derivative and limited. (*Id.* at 2) Plaintiffs' claims are derivative because they depend on the State's affirmative exercise of custody over its citizens and exist only while plaintiffs are within the custody of a State institution. (*Id.*) The claims are limited because they have to be balanced against the State's legitimate interests; in balancing those interests, the federal courts must show deference to the judgment of the State's professionals. (*Id.*)

On November 5, 1993, Judge Duff entered an Agreed Order to Appoint Expert Witnesses appointing three panelists: Dr. Robert Okin, Ms. Martha Knisley and Dr. Leona Bachrach. (App. Ex. (I) G ¶ 1.) Agreed Order directed the three panelists to

> investigate the practices, programs and polices [sic] of the Illinois Department of Mental Health and Developmental Disabilities (DMHDD) pertinent to conditions of care and treatment for mentally ill persons in the custody of these twelve DMHDD facilities. . . .

(*Id.* ¶ 2(a)(i).) After its investigation, the panel was to draft a report,

> explaining in detail its opinions as to whether or not the practices, programs and policies concerning: (1) health and mental health care and treatment; (2) use of restraints, seclusion and other restrictive measures; (3) physical and environmental conditions, including safety and sanitation, represent a substantial departure from professionally accepted minimum standards, practices and judgments. The Panel's report shall also advise the Court as to any other facts or matters that the Panel finds, or the Panel believes the Court will find, significant in the consideration of the Panel's opinions.

(*Id.*)

Defendants agreed to the appointment of these panelists subject to a number of safeguards in the Agreed Order. First, the Agreed Order provided that "[n]o party shall be bound by any of the opinions contained in any report of the panel." (*Id.* ¶ 10.) This safeguard tied into concerns expressed in defendants' original opposition

paper that the appointment might turn the experts into special masters and transform the proceedings into a "trial by witness." (App. Ex. (I) C at 7 n. 3.)

Second, and in the same vein, the Agreed Order provided that "any and all information provided to the panel, its consultants or the Manager shall be available to the parties' counsel on request." (App. Ex. (I) G ¶ 5(a).) Because of concerns expressed by Judge Duff regarding "whistle blowers," the Agreed Order permitted the panelists to interview "non-defendants" in confidence and "to limit dissemination of that [identifying] information to the Court and to counsel for the parties, who shall not further disclose it without leave of the Court." (*Id.* ¶ 5(b).) These same provisions clarified that *all* information, including the identity of these confidential interviewees, would be made available to counsel. (*Id.* ¶ 5(a), (b).)

Third, the parties agreed on the appointment of a Manager for the panel, Professor Norval Morris, who was given a specific "commission" that included serving as a buffer between the panelists and the Court. Under the Agreed Order, the Manager (together with his Assistant, Ms. Judith Cottle) were to

> coordinate and facilitate the investigation and reports of the Panel[,] . . . obtain and coordinate access for the Panel to DMHDD mental health centers and other facilities, programs and agencies, facilitate the Panel's collection of other information, facilitate communications between Panel members, as requested, make travel and lodging arrangements for the Panel, and report

> to the Court and the parties as to the progress and status of the Panel's investigation.

(*Id.* ¶ 3(a).)

Except for a provision allowing *in camera* disclosure of the identity of confidential interviewees, nothing in the Agreed Order permitted the panelists to communicate to the Court *ex parte*. (*Id.* ¶ 5(b).) To the contrary, the Agreed Order expressly stated that it was entered "pursuant to Rule 706 of the Federal Rules of Evidence." (*Id.* at ¶ 1.) That rule ensures against *ex parte* communications between the court and prospective witnesses: "A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate." Fed. R. Evid. 706.[2] Drafts of the Agreed Order circulated in October 1993 would have expressly permitted the Panel and the Manager to "communicate with the Court at any time without the inclusion of counsel," but that provision was excluded from the final draft, leaving Rule 706 as the sole governing authority on this subject.[3] (App. Ex. (III) K (8)(A) at 7, ¶ 6; (III) K (9)(B) at 6, ¶ 6.)

After appointment, the panelists were to conduct their investigation and prepare a draft report. (*Id.* ¶ 7.)

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[2] Nowhere in plaintiffs' 30-page opposition to, or Judge Duff's 23-page opinion denying the Recusal Motion is there a single acknowledgement of the plain language of Rule 706.

[3] Also excluded from the final order was the provision proposed by plaintiffs' counsel that they be allowed to communicate *ex parte* with the panelists. (App. Ex. (III) K (9) at 8-10.)

Dr. Bachrach withdrew from the panel soon after entry of the order, but the remaining two panelists proceeded, and a draft report was released on January 25, 1995. (Tr. 6/20/96.) Both the information obtained in the panelists' investigation and the draft report were to be kept "strictly confidential." (App. Ex. (I) G ¶¶ 5(a), 7.) After release of the draft, the Agreed Order required the panelists to "meet jointly with the parties to discuss and consider their views regarding the draft report; and the parties in anticipation thereof or thereafter may submit to the Panel any written comments (with notice and a copy to the other side) they may have regarding the draft report." (*Id.* ¶ 7.) The Agreed Order also provided that "[t]he Panel and the parties shall keep any such written comments strictly confidential and shall not make them public at any time prior to trial," with the sole exception that "each party may disclose to its consulting experts the draft report and all comments of any party. . . . " (*Id.*) The parties met jointly with the panelists in early April 1995 and submitted comments in June 1995. (App. Ex. (II) A at 3.)

The final report was released on June 26, 1995, but was not made public until December 1995. (App. Ex. (I) J; see text *infra* at 24-25.) The final report does not address, other than perfunctorily, the third subject of the panel's commission – "physical and environmental conditions." (App. Ex. (I) J.) it does give extended attention to conditions in the community at large, outside the State's facilities. (*Id.* at 43-51.)

Under the Agreed Order, discovery was closed until the issuance of the final report. (App. Ex. ¶ 5(c).) At a status hearing on September 27, 1995, at which Dr. Okin

and the Manager were also present, Judge Duff opened discovery, ordered the parties to disclose Rule 26 experts in 40 days[4] and set trial for March 4, 1996. (App. Ex. (I) K at 13-17.) He also ordered defendants to submit "a comprehensive concept paper looking at the totality of this mess, addressing the problems which are specified in the report and describing the scope and the content of the – of the consent decree that – to remedy." (*Id.* at 14.) Judge Duff also ordered that the concept paper "address critical issues that are raised in the complaint." (*Id.* at 17.)

Substantial Undecided Motions

On December 13, 1995, defendants filed their Motion for Partial Judgment on the Pleadings and to Simplify Issues for Trial (Judgment Motion), with a supporting memorandum filed on December 18, 1995. (App. Exs. (I) P, S.) The Judgment Motion challenged plaintiffs' "community" allegations on the grounds that they sought "to impose a federal constitutional duty on the State of Illinois to fund or provide benefits to plaintiffs while they are free of any state custody." (App. Ex. (I) S at 3.) Defendants argued that judgment should be entered on these allegations because, under *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989): "[a]s a general matter, a state is under no constitutional duty to provide

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[4] Plaintiffs' failure to name any experts within 40 days led defendants to file a motion to preclude expert testimony. (App. Ex. (I) N.) Judge Duff denied that motion and permitted plaintiffs subsequently to name additional experts of any kind. (App. Ex. (I) O at 1-8.)

substantive services for those within its border" and "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." (*Id.* at 1, 5.) Defendants further noted that even before *DeShaney*, in *Phillips v. Thompson*, 715 F.2d 365, 367 (7th Cir. 1983), the Seventh Circuit had determined that the mentally retarded had no due process right to state treatment in community settings. (*Id.* at 5.) Taken together, *Youngberg*, *DeShaney* and *Phillips* confirmed that the State had no constitutional duty to provide benefits in the community to those who were no longer in state custody. (*Id.* at 12.)

Plaintiffs responded to the Judgment Motion on February 15, 1996, and on March 18, 1996, defendants filed their reply, at which point the Motion was fully briefed. (App. Exs. (I) Y, Z.) By this time, Judge Duff had continued the trial to July 8, 1996. (See App. Ex. (I) W at 2.)

On April 4, 1996, plaintiffs filed a motion to amend their complaint. (App. Ex. (II) C.) Plaintiffs subsequently acknowledged that the amendment was intended to address defendants' Judgment Motion. (*Id.* ¶ 4.) Plaintiffs' amendment sought to allege that "some" members of the plaintiffs' class were wards of the Office of State Guardian and therefore had a right to community treatment. (*Id.*) Defendants opposed the motion to amend in a response filed on April 30, 1996, pointing out (1) that plaintiffs could not rehabilitate a broad classwide claim to noncustodial benefits based on the wardship of a small minority of class members and (2) that acceptance of plaintiffs' new theory would require decertification of the broad class. (App. Ex. (II) G.) Plaintiffs filed their reply on May 8, 1996. (App. Ex. (II) J.)

Judge Duff has yet to rule on either defendants' Judgment Motion or plaintiffs' amendment motion, so the parties have no clear idea of the scope of trial. Subsequent to the May 10, 1996 hearing, Judge Duff postponed trial to July 15, 1996, and then on July 2, 1996 he postponed it again, on plaintiffs' motion, to August 7, 1996. (App. Ex. (III) N at 28.) But he has on many occasions expressed his intention to begin trial when scheduled. (App. Exs. (II) N at 41, (II) W at 86, (III) C at 72., (II) M at 41, (II) W at 86, (III) C at 72.)

Disclosures to Defendants Immediately Preceding Emergency Motion for Recusal

Beginning in the spring of 1994, through oral and written requests under the Agreed Order and then a series of motions, defendants have sought to obtain the information on which the panel based its report. (See text *infra* at 42-45.) But Judge Duff denied defendants access to any such information until May 10, 1996, when he finally appeared to relent. (App. Ex. (II) K at 26-45.) On May 29, 1996, counsel for both plaintiffs and defendants visited the offices of the Manager and were shown certain documents from his files and those of the Assistant. (App. Ex. (II) at 35-36.) Copies were subsequently obtained. (App. Ex. (III) R.) In addition, with the agreement of the Manager and both sides, the panelists allowed some of their files to be photocopied and delivered to defendants (for review by both parties) in June 1996. (*Id.*) And on June 12, 1996, counsel for both parties again visited the offices of the Manager and this time were allowed to view – but not copy – documents that Dr.

Okin and Ms. Knisley had withheld from that production. (*Id.*; App. Ex. (II) L at 1.)

The following day, June 13, 1996, at a previously scheduled status hearing, defendants presented an Emergency Motion for Discovery on Possibility of Recusal, Stay of Proceedings and Protective Order, Instanter (Discovery Motion). (App. Ex. (II) L.) The Discovery Motion requested that Judge Duff: (a) order the preservation of documents pertaining to communications between and among Judge Duff, the panelists, national advocates, an attorney named Mark Heyrman and plaintiffs' counsel, and (b) order the production and copying of the documents viewed by counsel the previous day. (*Id.*) The Discovery Motion also requested a stay of all proceedings until Monday, June 17, 1996, when defendants would be prepared to file any motion for recusal. (*Id.*) At the hearing, defendants agreed that a discovery deposition set for the next day could proceed but maintained their request for a stay of all judicial proceedings. (App. Ex. (II) M at 6.)

At the June 13 hearing, Judge Duff ordered that defendants could obtain copies of the documents seen on June 12, subject to plaintiffs' agreement. (*Id.* at 39-43,) But he denied any stay of proceedings and imposed a deadline of 5:00 p.m. Friday, June 14, 1996, for defendants to file any recusal motion. (*Id.* at 43.) Judge Duff also ordered that plaintiffs file their opposition, if any, by 2:00 p.m. on Tuesday, June 18, 1996, and scheduled a hearing on the motion for 11:30 a.m. on Wednesday, June 19, 1996. (*Id.* at 43, 44.) On Friday, June 14, 1996, Judge Duff proceeded to hear and decide a motion to compel brought

by plaintiffs concerning certain privileged documents. (App. Ex. (II) N.)

Proceedings After the Filing of the Recusal Motion

As ordered, defendants filed their Emergency Motion for Recusal, Stay of Proceedings and Continuance of Trial (Recusal Motion) on June 14, 1996, together with an Appendix. (App. Exs. (II) O, P, Q.) The Motion asked that Judge Duff recuse himself *instanter* or, failing that, stay all other proceedings in the case during the pendency of the motion and continue the trial (App. Ex. (II) O.) In addition to copies of documents viewed on May 29, 1996, the Recusal Motion attached an Affidavit of Timothy J. Patenode, one of defendants' counsel, because plaintiffs' counsel placed obstacles in the way of defendants' obtaining copies of the June 12 documents. (App. Ex. (II) R.) When defendants left court on June 13, they had an agreement with plaintiffs' counsel for the copying of those documents at the Manager's offices, but on June 14, they raised new concerns. (App. Ex. (II) N at 43-46; App. Ex. (II) W at 45-49.) Plaintiffs' counsel claimed they could not permit copying until they had seen the documents again in order to ascertain whether their work product was present or the panelists bad sought "legal advice" that would be privileged from disclosure. (App. Ex. (II) N at 45.) After their second review on June 14, plaintiffs' counsel abandoned these grounds and, with the Manager's backing, objected to defendants' copying certain documents because they were "whistle blower" documents, even though defense counsel had already seen the documents and the Agreed Order permitted such information to be received by defendants' counsel. (App. Ex.

(II) W at 46-49; see text *supra* at 6.) As a result, defendants were prevented from copying several notebooks and other papers containing Dr. Okin's handwritten notes. (App. Ex. (II) W at 46-49.) Defendants copied the documents they were allowed to copy and filed them on the morning of June 18, 1996, in a supplemental appendix. (App. Ex. (II) T.) Additional documents were filed at the same time in a second supplemental appendix, together with an Affidavit of Ann Patla Pursuant to 28 U.S.C. § 144. (App. Ex. (II) U.)

Late on Monday, June 17, 1996, plaintiffs' counsel requested a conference call with defense counsel and Judge Duff to request additional time for plaintiffs to respond to the Recusal Motion. (App. Ex. (II) W at 55-56.) In that call, Judge Duff ordered the parties to appear before him on Tuesday, June 18 at 11:00 a.m. (*Id.*) The Judge then commenced a series of hearings in the morning and afternoon of June 18, the afternoon of June 19, and the morning and afternoon of June 20.

In those hearings, Judge Duff did the following:

(a) repeatedly inquired into how defendants came to view and copy the documents that were the basis for the Recusal Motion, stating several times that he had not ordered their release but had instead ordered that they not be released (App. Ex. (II) W at 7-9, 20-21, 77-79.);

(b) denied any stay of proceedings or continuance of trial (App. Ex. (II) W at 83-92; App. Ex. (III) C at 71-72.);

(c) abrogated the first schedule he had set for the Recusal Motion, as well as any hearing on the Motion (App. Ex. (II) W at 86.);

(d) allowed plaintiffs until Monday, June 24, 1996, to file their response (App. Ex. (III) C at 82.);

(e) agreed to decide the Recusal Motion on Monday, July 1, 1996 (*Id.* at 83.);

(f) prohibited defendants from submitting further documents in support of their Recusal Motion (*Id.* at 75.);

(g) prohibited defendants from filing any motions, including emergencies, without obtaining his leave and giving two days' notice (*Id.* at 73.);

(h) prevented defendants from taking any further discovery in aid of their Recusal Motion, including outstanding subpoenas to several of the persons whose communications with the Judge were the subject of the Motion (*Id.* at 46-49; 75-76.);

(i) prohibited defendants from questioning the panelists in depositions regarding their *ex parte* communications with the Judge or their "thought processes" or "work product" (*Id.* at 82.); and

(j) expressed his view that if defendants did not succeed on their Recusal Motion, they were in "deep doo." (App. Ex. (II) W at 86.);

In addition, at the hearing on June 20, 1996, Judge Duff released to defendants, for the first time ever, copies of

certain *ex parte* correspondence he had had with the Mental Health Association of Illinois (MHAI), an advocacy group, and plaintiffs' counsel. (App. Ex. (III) E at 7; App. Ex. (IV) Q, R.)

On June 24, 1996, plaintiffs failed to file any response or any motion requesting an extension of time. (App. Ex. (III) G.) The following day, defendants filed a motion for leave to file a reply memorandum, with a third supplemental appendix, requesting immediate decision on the motion; plaintiffs simultaneously filed a request for an extension of time to June 28, 1996. (App. Exs. (III) G, H.) Defendants' proposed third supplemental appendix contained some of the documents released by Judge Duff on June 20 as well as additional documents received pursuant to a subpoena on Mark Heyrman. (App. Ex. (III) L.)[5] On June 26, 1996, by written order without hearing, Judge Duff granted plaintiffs leave to file their response until June 28, 1996, and struck defendants' reply with leave to refile after plaintiffs' response. (App. Ex. (III) I.) No change was made in the previously announced ruling date of July 1, 1996.

On June 28, 1996, plaintiffs for the third time failed to respond to the Recusal Motion. Judge Duff gave them a fourth opportunity to respond by Sunday afternoon, July 30, and this time they did. (App. Exs. (iII) J, K.) The Judge made no change in the previously announced ruling date of July 1, 1996. Plaintiffs' response included affidavits from Mark Heyrman and Benjamin Wolf, two individuals

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[5] Defendants received a partial production from Mr. Heyrman before Judge Duff foreclosed further discovery.

upon whom subpoenas had been served and later quashed by the Judge. (App. Ex. (III) K, items 14, 15.) Defendants then refiled their reply brief and third supplemental appendix on the morning of July 1. (App. Ex. (III) L.)

Judge Duff failed to rule on recusal on July 1. (App. Ex. (III) N at 7-8.) On July 2, 1996, plaintiffs presented an emergency motion on less than twenty-four hours' notice requesting a continuance of trial until September 1996. (App. Ex. (III) M.) At that hearing the Judge continued the trial until August 7, 1996 and changed the July 8 pretrial conference into a status. (App. Ex. (III) N at 31.) But he again refused to stay proceedings and requested additional papers on the conduct of trial to be submitted by July 8. (*Id.* at 10-28.) He struck the refiled reply memorandum and third supplemental appendix, which he had previously given defendants leave to file. (*Id.* 8-9, 29.) And he stated that he would rule on the Recusal Motion before the July 8 status.

Judge Duff denied the motion in a July 2, 1996 memorandum opinion, released to the parties on July 3, 1996. With trial imminent and with substantial undecided pretrial motions going to the heart of Judge Duff *ex parte* communications, Judge Duff's decision should be immediately reviewed by mandamus and all proceedings stayed in the interim.

STATEMENT OF FACTS

The facts on which defendants based their request for disqualification are uncontroverted. Those facts come entirely from (a) documents produced by the panelists,

the Manager, Mr. Heyrman and Judge Duff, and (b) from statements made in proceedings conducted in open court. Of course, the facts are incomplete because Judge Duff has forbidden further inquiry.

These facts demonstrate that Judge Duff permitted himself to be drawn into a pro-plaintiff alliance. That alliance had Judge Duff at its hub, with the panelists, the Manager, plaintiffs' counsel, Mr. Heyrman and other advocacy groups both in Illinois and elsewhere as the spokes of the wheel. The Statement of Facts first recounts the *ex parte* communications with Judge Duff and their effect on his behavior, and then it shows the alliance between these other participants. Finally, the Statement details Judge Duff's efforts to prevent defendants from learning of this alliance and his renewed cover-up of the alliance after its existence leaked out.

I. JUDGE DUFF'S *EX PARTE* COMMUNICATIONS

A. Judge Duff's Ex Parte Communications with the Panel

1. The Witness Preparation of September 7, 1994

On September 7, 1994, after the panelists had conducted their investigation and before beginning to write their report, the panelists, their lead consultant Dannia Southerland, the Manager and his assistant met with Judge Duff for three-and-a-half hours in Judge Duff's chambers without the presence of party counsel. The existence of that meeting was recorded, after the fact, in

the Manager's report and diary,[6] but nothing was mentioned about its purpose or contents other than that it was a "progress report." (App. Ex. (IV) L.) (App. Ex. (IV) L.) Only in the two weeks immediately preceding defendants' recusal motion did defendants receive hard evidence of the actual subjects discussed. That evidence consists of a document entitled "Outline for Conference with Judge Duff 9/7/94" and a "File Note" from Martha Knisley. (App. Exs. (IV) I, J.) A subsequent document establishes that the Outline was prepared by Dr. Okin. (App. Ex. (IV) K.)

Ms. Knisley's File Note states that the *ex parte* meeting with Judge Duff was "for a debriefing on our impressions to date (outline available)." (App. Ex. (IV) J.) After that debriefing, the parties "set a course of action for completing the preliminary draft." (*Id.*) Dr. Okin's Outline confirms that several facets of the experts' potential testimony were discussed *ex parte* with Judge Duff in that meeting. (App. Ex. (IV) I.) The panel discussed the "History and rationale for the methodological approach we chose for our inquiry in *K.L. v. Edgar*." (*Id.* at 1.) The Outline also enumerated five "ways in which [the panel's] approach differs from other inquiries such as JCAHO." (*Id.*) The panel thus sought to persuade Judge Duff of the superiority of their approach to that of the

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[6] The first mention that the panelists were intending to hold this meeting came in a report of the Manager, mailed on September 8, a day after the meeting was actually held. (App. Ex. (III) K, item 16.)

JCAHO[7] studies expected to form an important part of defendants' case.

The Outline further proposed "three irreducible obligations of the modern state hospital," and alleged a duty to provide "residential and treatment settings" in the community, matters that are directly challenged in both defendants' 1993 position paper and their 1995 Judgment Motion. (*Id.*; see text *supra* at 5, 9.) The "General Findings" of the Outline consisted of "failures" to meet these obligations. (*Id* at 2.) The Outline for the *ex parte* conference was used later that month to prepare a draft outline for the report. (App. Ex. (IV) K.) In several places the draft outline quotes the "Outline for Conference with Judge Duff," and the panel's report adopts much of the language of the "irreducible obligations" verbatim. (*Id.* at 3, 5, 6.)

After the filing of the Recusal Motion, at a hearing on June 18, 1996, Judge Duff disclosed, briefly and for the first time, his role in the *ex parte* meeting of September 7, 1994. He disclosed that he had played an active role in preparing the panelists' opinions, acting to ensure that the panelists' opinions were based on "a scientific methodology" and would withstand any challenge under the Supreme Court's *Daubert* opinion:

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[7] JCAHO stands for the Joint Commission for the Accreditation of Healthcare Organizations, a national accrediting body for hospitals and other providers. Nine of the State's ten mental health hospitals have received JCAHO accreditation.

THE COURT: And this letter was written on September 7th – this outline was made up for a conference with me.

Now, if the expert report which you both wanted is going to be accepted – and I have to presume you wanted it to be accepted at that point in time, in September of 1994, which was before the report came out, you both told me you wanted a good report from the experts. And I am responsible to make sure as the guardian, so to speak, under the *Daubert* opinion, I'm supposed to make sure that the experts, especially if it's a court's expert, is doing their job right because I don't want to then throw out the experts if they haven't tried to do the right job.

If, on the other hand, they take the stand and their expertise is stipulated to by your selection and their method is scientific and meets the standards of scientific methodology, and it's never been done before anywhere, I would expect it to be subject to challenge by anybody that didn't want the case in.

The methodological report in my opinion would be best shown to me so that if you, either one of you, at that state of the game before the report was out and did any damage would want to challenge it, you should have.

Now, I talked to them I think – I don't remember – but I talked to them I think about the fact – I think I told Professor Morris they must have a scientific methodology.

Now, if indeed Professor Morris told them "You're going to have to show the judge that you have a scientific methodology," that wouldn't have been because I was trying to be

> influenced on the case, that's because I was trying to serve both of you in our efforts to settle this report and get a decent proposal out that wouldn't be attacked by the press and the legislators and a lot of other people that you're going to need.

(App. Ex. (III) C at 43-44.)

Ironically, after assuring himself that the panel's report would withstand a *Daubert* challenge, Judge Duff has on several occasions, after the issuance of the report, acknowledged defendants' right to challenge the panel's methodology under *Daubert*. On May 25, 1995, the Judge suggested *sua sponte* that *Daubert* was the basis on which any challenge to the panel's methodology would be decided. (App. Ex. (I) I at 7.) At a hearing on September 27, 1995, the Judge again stated that any challenges to expert testimony would be considered under *Daubert*. (App. Ex. (I) K at 20-21.) Then plaintiffs' counsel said:

> MR. GROSSMAN: The defendants have told us that – clearly they have told us that in written submissions to the Court they object to the methodology that had been engaged in by the panel. That was their –
>
> THE COURT: So we will have a *Daubert* hearing.

(*Id.* at 23.) Again, on May 10, 1996, Judge Duff promised defendants that they could challenge the panel's methodology:

> Now, if you want – you can try to attack their methodology if you want, that's fair. Your experts may say "That's not the way they

> should have done it," and they will say "Well, I think this is the way we should have done it."
>
> I didn't tell them what to do. They decided on their methodology. Rule 26 tells you and the *Daubert* decision tells you that you can examine their technology.

(App. Ex. (II) K at 37.)

While thus assuring defendants *on* the record that they could challenge the panel's methodology, at no time until June 18, 1996, did Judge Duff disclose that he had pre-screened and pre-approved the panel's methodology *off* the record.

Judge Duff's pre-screening of the panel's methodology and findings has had other effects on his behavior as well. First, it has apparently delayed his ruling on a key issue. As Dr. Okin later related to an advocacy group, the panel "used an interesting methodology and we attempted to create a new legal basis for community treatment." (App. Ex. (IV) at 2.) Indeed, Dr. Okin boasted that they "were initially requested by the Judge to review these facilities, but *persuaded* him that we could not adequately do so without reviewing the community mental health system as well." (*Id.* (emphasis added).) As noted above, Judge Duff has so far failed to rule on defendants' Judgment Motion, which challenges any federal constitutional basis for community treatment, as a matter of law. (See text *supra* at 9.)

Second, Judge Duff has cited the report's conclusions as fact. At a hearing on May 25, 1995, Judge Duff defended the report, concluding: "They're experts. I trust them . . . . " (App. Ex. (I) I at 15; also at 9-10, 19.) In

response to defendants' objection that the panel's report contained conclusions on which "reasonable minds [could] differ," he countered: "There are no conclusions in that report." (*Id.* at 40.) Judge Duff then illustrated what he meant by reading portions of the report:

> Oh, I'll give an example that they gave of group therapy sessions. "An example from our clinical case studies" – and those are clinical case studies, facts, okay? – "demonstrates that point," the point about the group therapy sessions were seldom documented and few details could be found in an individual patient's records to show which groups the patient attended. . . . *That's an assertion of fact, not opinion.* . . .
>
> Then [the report] says: "(1) An ubiquitous lack of sophisticated clinical leadership that could have assisted the staff in addressing the internal issues that were torturing their patients and that often led to repeated hospitalizations." *That's assertion of fact.*

(*Id.* at 4 (emphasis added).)[8] After describing the panel's opinion that the Department has "[a] system wide emphasis on treating the patient's chart rather than the patient," the Judge added:

> By the way, that also may be a management problem because you're understaffed, underappropriated, and under many other things. It

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[8] This portion of the hearing was "sealed" because the report was not yet public. These pages are grouped at the beginning of App. Ex. (I) I, but the sealed portion of the hearing begins at page 42 of the main transcript.

> may not be the Governor's problem at all, it may be the legislature's problem.

(*Id.* at 5.)

Finally, although the statistical validity of the panel's report is clearly in issue – defendants have identified an expert to challenge just that point – Judge Duff has several times indicated his personal belief that the report is valid despite the small number of cases. (App. Ex. (I) X at 19-20; App. Ex. (II) K at 34-35; App. Ex. (II) W at 96-97.)

2. Dr. Okin's November 8, 1995, Memo

As recited above, in a September 27, 1995, status hearing at which Dr. Okin, the Manager and the Assistant were present,[9] Judge Duff demanded that defendants prepare for him a "comprehensive concept paper" regarding settlement. (See text *supra* at 8.) Defendants submitted that concept paper to Judge Duff and plaintiffs on October 25, 1995. (App. Ex. (IV) T.) On October 27, 1995, without defendants' authorization, the Manager's Assistant taxed a copy of the concept paper to Dr. Okin. (App.

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[9] In the last line of the transcript, the reporter caught this remark of Judge Duff as he left the bench:

> Doctor, if you want to talk before you go back to California, I would be delighted to go back with you. You can bring your buddies if you want. (App. Ex. (I) K at 30.)

No disclosure has ever been made of the Judge's conversation with Dr. Okin and the Manager that day.

Ex. (IV) T.)[10] On November 8, 1995, Dr. Okin sent a memo to the Manager, stating:

> Please communicate to the judge my concern about the defendants' concept paper. It is important for the judge to know that, in my opinion, the response of the defendants is both outrageous and stonewalling, and is totally disrespectful to both the panel and the court.
>
> Is it possible for Marti and I to have an opportunity to discuss this concept paper with the judge before any major moves are made?
>
> If you disagree with this, however, I will go with your judgment.

(App. Ex. (IV) U.) On the document at the time it was seen by defense counsel was a "post-it" note with a phone number identified as Judge Duff's fax number. (App. Ex. (II) R 1.) Judge Duff has never denied receiving that fax, but has instead berated counsel over the irrelevant fact that he receives his faxes on the same machine that all the district judges do. (App. Ex. (II) M at 17-18, 32-34; App. Ex. (II) N at 19-20.)

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[10] The Agreed Order provides that "[s]hould *the parties* advance to the Court *a* proposal for the settlement of this action, the Court may then require the Panel to advise it as to the merits of the proposal." (App. Ex. (I) G ¶ 2(a)(ii) (emphasis added).) No provision of the Agreed Order permits the Panel to comment to the Court on a *single* party's settlement *offer*, as opposed to a proposal already agreed to by the parties.

Neither the fact nor substance of Dr. Okin's memo was contemporaneously disclosed to defendants. Yet subsequently Judge Duff complained about the parties' failure to settle as though it were all defendants' fault.[11] (See text *infra* at 56-57.)

3. Dr. Okin's November 27, 1995, Memo and December 7, 1995, Letter to Judge Duff

On November 27, 1995, Dr. Okin sent a memo to Ms. Knisley and the Manager. (App. Ex. (IV) V.) On December 7, 1995, Dr. Okin sent a letter directly to Judge Duff, with a copy to the Manager, stating "I understand you and Norval [the Manager] talked earlier this week . . . " (App. Ex. (IV) W.)

Both of these communications proposed strategies that Judge Duff could pursue to pressure defendants into a settlement, namely a timed release of the report and the application of pressure on the Governor and Legislature:

- "Although I believe that the defendants are unlikely to settle this case, there is a small albeit very small chance, that they might settle it – but only if there is a great deal of political pressure on them to do so. As long at the Report remains unavailable to the public, there is no flag for advocacy groups to rally around to exert this pressure."

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[11] He also decided to grant plaintiffs the opportunity to discuss defendants' concept paper directly with panelists, in apparent disregard of the Agreed Order. (App. Ex. (III) K, item 18; see text *supra* at 21 n.10.)

- "I understand that you [Judge Duff] and Norval talked earlier this week and that you agreed to release, the Report. I'd like to express my support for that decision and also reflect on the timing of the release. . . . If the report is released immediately, we won't have time to meet with key editorial boards before it hits the street. Imparting an understanding of the Report to these boards is crucially important. This fight need to be won on the street, not just in court. . . . If it is released too late, a rather small window of opportunity for legislators to file bills relating to our findings will be closed."

- "These reports tend to get cold if they sit on the shelf too long – at least that's what defendants can argue. States faced with a critical report often contend that its out of date by the time it gets published."

- "As a courtesy to the Governor, the Judge might offer him the opportunity to meet with us to answer questions, describe the experience of other states with respect to litigation of this kind in the face of legislatures that are opposed to 'judicial interference,' and let him know just how bad his mental health system really is. The Judge would be doing him a real favor in allowing us to give him the facts so he, can weigh his options more carefully. Would he really be prepared to litigate this case if he knew what he was going to have to publicly defend?"

- "By the way, the legislatures' anger about consent decrees is standard fare. No legislature likes them but with the right approaches, even the most reluctant legislatures have put up the money. How loudly they gnash their teeth is irrelevant. Whether they pay is the only relevant issue. If the

system is viewed as deficient and this is highly publicized, legislatures will pay, whatever the niceties of the balanced [sic] of powers."

- "It is easy for governors to hide behind the legislature when they don't want to do something . . . Howard [Peters, the Governor's Deputy Chief of Staff,][12] may have been doing this the other day in your chambers. Even if governors do not use them this way, legislators can be a major obstacle to settlement."

- "Legislators feel their prerogatives are being infringed upon. . . . The suggestion I'd like to make to you is that as a courtesy, you extend an invitation to key legislators to meet with you (and perhaps Norval, Marti, myself and the parties – but only if the latter absolutely need to be present) in chambers so that you can tell them about the case and our findings before or soon after the Report is made public. . . . At best, you will turn potential enemies into allies or at least into people who understand that what you do in this case grows not out a desire to usurp their authority but out of your belief about what is required by law and compassion."

(App. Exs. (IV) V, W.)

Neither the fact nor the substance of that letter or Judge Duff's prior conversation with the Manager was contemporaneously disclosed to defendants.[13] Only on

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[12] Mr. Peters was present with Ann Patla, the DMHDD Director, the parties, the panelists, the Manager and Judge Duff in an in-chambers settlement conference on November 21, 1995.

[13] But these letters *were* contemporaneously disclosed to Mark Heyrman, counsel to plaintiffs in other pending suits

May 10, 1996, did Judge Duff acknowledge for the first time receiving some unidentified letter from Dr. Okin, which the Judge said he "didn't read" and did not further describe. (App. Ex. (II) K at 77.) Yet he later acknowledged receiving and reading the December 7, 1995, letter from Dr. Okin.[14] (App. Ex. (III) C at 34-35, 37.)

Further, although Judge Duff denies being affected by these communications, his actions speak otherwise. Following receipt of these communications, at a hearing attended by the Manager, Judge Duff announced that he would release the panel's report. (App. Ex. (I) O at 30.) As Dr. Okin had requested, Judge Duff announced that the release would occur two weeks later on December 21, 1995, timed so that it would not be "immediate" and also not "too late." (*Id.* at 30-31.) The rationale offered by the Judge for the release of the report resembled Dr. Okin's: "I think if the apple sits too long it's going to get mushy and then rotten, and there is some truth to the fact that the longer you delay the delivery of that report, the more possible it is for it to get hardening of the arteries." (*Id.* at 32.)

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against DMHDD and a consultant to plaintiffs in *this* case. (See text *infra* at 32, 39.)

[14] At both hearings Judge Duff also said that after receipt of the December 7, 1995, letter from Dr. Okin, he told the Manager to instruct Dr. Okin to have no further *ex parte* communications with the Judge. (App. Ex. (II) K at 77; App. Ex. (III) C at 34-35.) But in fact Dr. Okin sent at least two subsequent *ex parte* communications to the Judge. (See text *infra* at 29.)

Although Judge Duff claimed that he was delaying release so that the parties could get ready, there is evidence that he was allowing Dr. Okin to get ready to pursue the campaign he outlined in his memos, that of talking to newspaper editorial boards and advocacy groups. (App. Exs. (IV) V, W.) A December 19, 1995, fax from Dr. Okin to the Manager attached a draft press release Dr. Okin had prepared with gaps for the Manager to complete. (App. Ex. (IV) Z.) A memo from Dr. Okin to the executive staff of his hospital advised that he would "be away from the Department of Psychiatry, San Francisco General Hospital, Thursday, December 21, 1995, through Monday, January 1, 1996." (*Id.*)[15]

Also following his receipt of these *ex parte* communications from Dr. Okin, Judge Duff began a campaign to bypass the State's designated representatives in the case and speak directly with the Governor and legislative leaders. Beginning with a hearing on December 7, 1995, Judge Duff turned up the volume on what previously had been only casual comments about possible involvement by the Governor's office or the Legislature in the event of a settlement agreement. In that hearing, Judge Duff said that "I'm not sure that the key decision-makers in Illinois from the perspective of settlement understand all the facts. . . . I frankly believe that it would be helpful for me

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[15] Unfortunately for Dr. Okin's plans, the report was leaked to the Chicago Tribune and publicized on December 20, 1995. Judge Duff thereafter blamed defendants for the leak, but Dr. Okin himself leaked the report to an advocacy group in Washington, D.C., on December 13, 1995. (App. Ex. (IV) X.)

to sit down with all of you and the Governor." (App. Ex. (I) O at 12.) The Judge also suggested that he talk

> not only to the Governor but to the leaders of the legislature to get a sense of what you all could think about because you are not going to be able to get what I could get, I think. You could get it through me, though, if you understand me, at least in terms because, for example, what you want can't happen without some assistance from the president of the Senate . . . .

(*Id.* at 17.) At the same hearing Judge Duff echoed Dr. Okin again, saying, "I don't think she [the DMHDD Director] really knows how bad things are." (*Id.* at 15.)

A week later at a hearing on December 13, 1995, the Judge raised the issues again saying "[t]wo of the biggest hurdles that you may have . . . is the legislature. . . . " (App. Ex. (I) Q at 27.) He echoed Dr. Okin's comments once again, saying that "[l]egislatures don't like judges telling them what to do," but he emphasized his personal acquaintance with the leaders of both houses. (*Id.* at 27-29.) Then he said:

> Now, what does this mean? That means that I can sit down with these two people and say, "You know, these people are afraid that no matter what they do, what they agree to that you guys are going to really object to it. Give me some idea. What are you thinking about?" I think they would.

(*Id.* at 29.) The Judge then raised the Governor:

> I would also say to you that I was in the legislature when the Governor was administrative assistant to the Speaker, and I know him. I

> could talk to him and find out what he thinks without law, attitudes, feelings about what I think, I could find out what's going on . . . .

(*Id.* at 30.) And finally, the Judge put the direct question to defendants' counsel, "Would you be interested in my doing that?" (*Id.* at 31.) Plaintiffs had no objection to that personal consultation, but defendants demurred. (*Id.*)

On March 25, 1996, at the presentation of defendants' Motion for Full Expert Disclosures, Judge Duff remembered his request to talk to the leaders of State government. At that hearing, the Judge stated:

> I really think it would be beneficial, although they're not parties, for you all, the Governor, to arrange a private settlement conference including the leaders of both sides of both houses so we can have a general conversation about whether we are wasting our time or not. . . .
>
> I want a very, very significant question of legislation, settlement negotiations dealt with at the level it's supposed to be dealt with, which is with the United States District Court judge and the Governor of Illinois and the representatives of people who claim their constitutional rights are being abridged by the Governor. . . .
>
> Now, the Governor may worry about that because when the Governor knew me, he was a gofer in the legislature and I was a very active and vocal legislator.

(App. Ex. (II) B at 14-15.)

Prior to a hearing on May 10, 1996, both sides submitted status reports to the Court. (App. Exs. (II) H, I.)

Each side stated that there were no prospects for settlement at the time. (*Id.*) But on May 10, 1996, at the hearing of Defendants' Motion for Full Expert Disclosure, Judge Duff again asked for the leaders of State government:

> I think it would be very valuable to have the Governor and Ms. Patla in here in the kind of open sessions we have had before to discuss this thing.
>
> He has no reason to be afraid of me, and he knows that. I don't think this is going to happen without his participation, and I think it's going to be hard to conduct this trial and after the fact it's going to be hard because there is big, big hills to climb past him. You can name them. One of them is Pate Philips [sic], one of them is Lee Daniels, and possibly Mike Madigan. Emil Jones I don't think you will have so much trouble with.

(App. Ex. (II) K at 63.) When defense counsel responded that responsible, high-level representatives of the State had already attended settlement conferences held by the Court and that the Governor could not set a precedent by appearing at a settlement conference in a case in which he is named only in an official capacity, Judge Duff vehemently expressed his displeasure at the Governor's failure to appear. (*Id.* at 63-70.) He ultimately resorted to veiled threats:

> Do you know how many cases that I have in this courtroom right now that the Governor is very, very concerned with? Do You?
>
> MR. CHEFITZ: I imagine a few.
>
> THE COURT: Well, you're supposed to be responsible for everybody who wants to talk to

> the Governor. You should know that the recent revenue bill is up here for a preliminary injunction within weeks, including hundreds of millions of dollars, they tell me, or, many millions of dollars of revenue to the state of Illinois. Does that mean that I'm not important to the Governor or that somehow or other I'm being pretentious? (*Id.* at 70.)

Finally, on June 13, 1996, at the presentation of Defendants' Recusal Motion, Judge Duff raised the question again, asking defense counsel if he had spoken to the Governor about a meeting. (App. Ex. (II) M at 19.) Defense counsel said that he had, and he and the Judge had this exchange:

> MR. CHEFITZ: Your Honor, the governor cannot afford to set a precedent of getting involved personally in every case in which he is named in his official capacity. He told me, and I have never counted it up, that there are hundreds, if not thousands, of such cases.
>
> THE COURT: I know that, counsel, and I don't think, there are three that are more important than this one, and I probably have the other two.[16] Maybe there are other judges that have them.
>
> But the point is this is a massively important case to the people of Illinois, okay? Now, the governor is the governor of Illinois and he is being sued. You say it's only in his official capacity. Okay, in his official capacity I want to

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[16] Defendants believe the two cases referred to are *Robbins Resource Recovery Partners v. James Edgar*, No. 96 C 1735, and *Alvin D. Pearson v. Jim Edgar*, No. 86 C 2181.

> talk to him. Now, if I have to, I'll subpoena him and I'll set a precedent, okay? And if nothing else, I'll insist that he be a witness in this courtroom if I don't get to talk to him, and then I will ask him questions under oath in the courtroom. (*Id.* at 20-21.)

The Judge reiterated this threat when he set the hearing (later vacated) on the Recusal Motion: "I may even subpoena the Governor for that hearing." (*Id.* at 31.)[17]

Judge Duff has permitted Dr. Okin to influence him into pressuring defendants with all means at his disposal.

4. Dr. Okin and Ms. Knisley's December 1995 Letters to Reviewers

Judge Duff's investment in the preparation of the panel's report is also demonstrated by a pair of letters dated December 18 and 19, 1995, that Dr. Okin and Ms. Knisley sent to consultants they had retained, advising them of the imminent release of the report. (App. Ex. (IV) Y.) Ms. Knisley's December 18, 1995, letter stated that "[t]he report is likely to be attacked by the defendants . . . . Meanwhile, the Judge is pleased with the report." (*Id.*) Dr. Okin's December 19, 1995, letter complimented the quality of the case reviews and was copied to Judge Duff and the Manager. (*Id.*)

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[17] Judge Duff's demand for the Governor's appearance was entirely without basis in the law, as demonstrated by the memorandum submitted to Judge Duff on June 19, 1996, and as finally acknowledged by the Judge. (App. Ex. (III) C at 3, 14, 15.)

Neither the fact nor the substance of these communications was contemporaneously disclosed to defendants.

5. Dr. Okin's January 3, 1996, Memorandum to Judge Duff and the Manager

The last of the documents that defendants have been able to obtain showing direct *ex parte* communications between the Judge and the panelists is a January 3, 1996, memorandum from L. Okin to Judge Duff and the Manager. The memorandum stated that it enclosed copies of three articles describing a case in which Dr. Okin was the defendant:

> I thought you might be interested in the enclosed publication regarding the Northampton Consent Decree and the other two articles which describe the process and outcome of the Consent Decree. I was the willing and active defendant in the case when I was Commissioner of Mental Health in Massachusetts.

(App. Ex. (IV) DD.)

The memorandum demonstrates Dr. Okin's continuing attempt to influence Judge Duff toward a particular settlement result. Neither the fact nor the substance of this communication was contemporaneously disclosed to defendants.

B. Judge Duff's *Ex Parte* Communications with Advocacy Groups and Plaintiffs' Counsel

One spoke of the wheel extends from Judge Duff to the panelists; another extends to a local advocacy group,

the Mental Health Association of Illinois (MHAI), and plaintiff's counsel. In a public hearing sponsored by the MHAI in January 1996, Dr. John Day, the MHAI's president, said that the MHAI had "teamed up with the ACLU and the media to both initiate a class action lawsuit against the State of Illinois, and publicize its findings through print and electronic media. . . . " (App. Ex. (IV) FF at 1.)

On July 11, 1995, in pursuit of this strategy, Dr. Day and MHAI's executive director Jan Holcomb sent a letter directly to Judge Duff about this case. (App. Ex. (IV) Q.) That letter was copied both to Benjamin Wolf, one of plaintiffs' ACLU counsel, and to Richard Lockhart, the MHAI's lobbyist and an old friend of Judge Duff. (*Id.*; App. Ex. (III) C at 76-78.) The letter pleaded the merits of plaintiffs' case and asked for the Judge to release the report:

> The Mental Health Association in Illinois (MHAI), through its Site Visitation Program, provided information on abusive conditions in Illinois's state-operated psychiatric facilities that lead [sic] to the filing of the K.L. v. Edgar lawsuit some three years ago. . . .
>
> Meanwhile, the risks continue for patients in state-operated facilities and state-funded community programs along with the attendant worries of their families. Despite a plan for reform of the mental health system, the plan remains largely unimplemented. As a copy of our testimony on the adopted FY 1996 budget for mental health indicates, the monies allocated for mental health do not even allow for providers of community mental health services to keep pace with

inflation, not to mention the implementation of reforms that prevent unnecessary psychiatric hospital admissions and the provision of aftercare services to the increasing number of discharges and deflections to community providers. In addition, reports and public comments by the Inspector General for the Illinois Department of Mental Health and Developmental Disabilities (DMHDD), indicate high levels of patient-to-patient abuse that are attributable to under staffing and which go uninvestigated, also because of insufficient staff. A recent story in the *Illinois Times* tells of a tragic rape in McFarland Mental Health Center, in which the victim was discouraged by state mental health staff from reporting the offense. Last fall, MHAI was informed of a situation involving the inappropriate discharge of patients from Madden Mental Health Center to an apartment building in DuPage County (not even in the Madden catchment area) owned by the father of a psychologist on staff at Madden who had arranged the discharge. No aftercare linkage was established with the DuPage County facility. The clients alleged physical abuse by the staff/owner of the apartment building. The apartment building burned down, and the clients mysteriously disappeared for several weeks. The DuPage mental health director's calls to the DMHDD Director's office were ignored for weeks, until he finally filed a complaint with the Inspector General. These and similar situations are cause for continued concern and alarm.

Given the fact that human lives and health are at stake and at risk, we believe that further delay of these legal proceedings is not warranted. We also believe that the public, including recipients

> and their families and mental health advocacy organizations like MHAI are entitled to the information contained in the Expert Panel Report. . . .
>
> It is in this spirit that MHAI calls for the release of the report and a time table for the negotiation or adjudication of the K.L. complaint.

(App. Ex. (IV) Q.)

After receiving this letter, neither Judge Duff nor plaintiffs' counsel provided a copy to defense counsel. Instead, Judge Duff had *ex parte* communications with Mr. Lockhart. (App. Ex. (III) E at 7-8, 10.) He also prepared a response to the letter, after consulting with the Manager. (*Id.* at 4-5; App. Ex. (IV) R.) That response was sent back to Ms. Holcomb and Dr. Day, again with copies to Mr. Lockhart and Mr. Wolf of the ACLU, but without any copies to defense counsel. (App. Ex. (IV) R.) That response recites in part:

> In due time, we hope we will achieve some significant results. In the meantime, I disagree with your feeling that the public or anybody else is entitled to the publication of the expert panel report which is confidential and a working paper for the purpose of either assisting in the negotiation of a consent decree or for possible utilization during trial, if any. . . .
>
> The court is as concerned as you are. This is a massive undertaking and I would suggest that you give us the same confidence that we will fulfill our role as we give you that you will fulfill your role.

(*Id.*)

While plaintiffs' counsel contemporaneously received copies of both letters from Judge Duff, defendants did not receive copies from either Judge Duff or plaintiffs' counsel until after the filing of their motion for recusal.[18] (App. Ex. (III) C at 77-78; App. Ex. (III) E at 7.)

After receiving the MHAI's letter, Judge Duff did what the MHAI requested. On September 27, 1995, he set a timetable for the negotiation or adjudication of the K.L. complaint. (See text *supra* at 8.) And in December 1995 he released the report. (*Id.* at 24-25.) Judge Duff's behavior was directly influenced by *ex parte* communications with advocacy groups and plaintiffs' counsel.

C. Judge Duff's Ex Parte Communications With Mark Heyrman

Another spoke of the wheel extends from Judge Duff to an attorney named Mark Heyrman. By his own admission, Mr. Heyrman consulted with plaintiffs' counsel prior to the filing of this suit concerning the drafting of the complaint. (App. Ex. (IV) A.) He has also acknowledged filing several lawsuits, including some class actions, against DMHDD. (*Id.*) Because of his adverse relationship with DMHDD, defendants objected to Mr.

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[18] Under Rule 3.5(i) of the Illinois Rules of Professional Conduct, plaintiffs' counsel had an obligation to provide copies to defendants' counsel of these letters, independently of what Judge Duff chose to do or not to do. Not only did plaintiffs' counsel fail this obligation, they successfully sought to quash a later subpoena that would have disclosed this and similar *ex parte* communications. (See text *infra* at 47.)

Heyrman's involvement with the panel, as Judge Duff has acknowledged. (App. Ex. (II) M.)

The first knowledge defendants had of *ex parte* communications between Judge Duff and Mr. Heyrman was the Judge's statement in open court – after the Recusal Motion was filed – that he had received a letter from Mr. Heyrman transmitting an article. (App. Ex. (II) N at 40.) Defendants have received no copy of any such letter, and Judge Duff has offered no further description of its contents. Nor have defendants received the documents from Mr. Heyrman – whose response to defendants' subpoena was not completed before further investigation was prohibited by the Judge – although he did describe it in an affidavit submitted in support of plaintiffs' response to the Recusal Motion. (See text *supra* at 14 n.5; App. Ex. (III) L (9) 3.)

Neither the fact nor the substance of this *ex parte* communication was contemporaneously disclosed to defendants.

D. Judge Duff's Ex Parte Communications With the Manager

As mentioned above, under the Agreed Order the Manager was to act as a buffer by "report[ing] to the Court and the parties as to the progress and status of the Panel's investigation." (See text *supra* at 6.) In the course of subsequent proceedings, Judge Duff assured defendants that the Manager was acting in this narrow role. At the hearing on May 25, 1995 Judge Duff confirmed that:

> Professor Morris' role is to make sure that the more difficult aspects of communication between adversarial parties and experts developing information were monitored in a fashion that would not be a disadvantage to any party or to the purposes that I believe you all agreed were to be achieved.

(App. Ex. (I) I at 7.) On March 25, 1996, Judge Duff further noted that the Manager's role was not that of an expert panelist but as a manager who would report "to me as to how the experts were going and the administration of their responsibilities and all of these things that we have argued with – you have argued with each other in front of me about the process. . . . " (App. Ex. (Ii) B at 8.) Ostensibly because of the Manager's nonsubstantive, administrative role, Judge Duff has forbidden further disclosure of his communications with the Manager. (E.g., App. Ex. (III) C at 36-37, 75.)

But the Manager has exceeded his narrow commission under the Agreed Order. He has been a party to or a conduit for communications between the Judge and others that are hardly "non-substantive" or "administrative." He was a party to the September 7, 1994, meeting with Judge Duff and the panelists about the substance of the report. (See text *supra* at 16.) Indeed, in the course of that meeting he apparently discussed: (a) "ICF," or intermediate care facilities, which are privately owned mental health facilities in the community; (b) "Mark," which is presumably Mark Heyrman; and (c) Jess McDonald, who had been but was not the DMHDD director. (App. Ex. (IV) I; App. Ex. (III) C at 45-46.) The Manager also communicated Dr. Okin's November 27, 1995, comments to

Judge Duff and received a copy of Dr. Okin's December 7, 1995, letter to the Judge, each of which outlined a campaign to exert political pressure to force a settlement. (See text *supra* at 22.) He consulted with Judge Duff on his response to the July 11, 1995, MHAI letter, which was substantive. (*Id.* at 31.) And was copied on the panelists' December 18 and 19, 1995, letters to their consultants. (*Id.* at 29.)

Aside from participating in substantive conversations with the Judge, he has taken a substantive role in the preparation of the panel's report. The Manager's time reports reflect that for November and December 1994 and January 1995, he devoted approximately 60 hours to working on the report. (App. Ex. (IV) O(1)(b).) By contrast, Ms. Knisley recorded a total of 47 hours on "Report preparation" and related activities – 26 hours in December 1994 and 21 hours in January 1995. (*Id.* at O(1)(a).) For this same period, Dr. Okin recorded a total of 23 hours, all from a two-day consultation trip to Chicago on January 13 and 14, 1995. (*Id.* at O(3)(a).)

The Manager's co-authorship of the report is confirmed by other evidence as well. On May 25, 1995, the Judge said "Professor Morris not only in fact but by what I would call notoriety has an enormously able writing skill. It may be that the doctors are better at chemistry than they are at the nuances of the English language." (App. Ex. (I) I at 16; *cf.* (II) K at 15.) Dr. Okin, in his November 27, 1995, memo to the Manager (not seen by defendants until June 12, 1996), said "[a]s the best author amongst us, I wonder whether you, Norval, would want to write a first draft of an Executive Summary [of the

report]." (App. Ex. (IV) V at 2.) The ACLU's press materials on the panel's report, which were found among the Manager's papers, described the report as having been "prepared by" Dr. Okin, Ms. Knisley and the Manager. (App. Ex. (IV) AA.) Finally, at the hearing on May 10, 1996, the Manager advised that he had given the panelists his opinion "on how they might express their opinion," and later elaborated as follows:

> I acted as a postoffice because on the same topics I would get reports from both experts. Then I would try to draft something that might have acceptance to them both. That happened, that probably is sort of creative, but otherwise, it was just straight editorial. I did all the typing, I kept doing successive drafts.

(App. Ex. (II) K at 15-16, 80.)

Whether his activity is called "drafting" or "editing" the Manager went beyond the narrow commission in the Agreed Order of "coordinating and facilitating the investigation and reports of the Panel" and instead participated substantially in creating the panelists' expert report.[19] His otherwise appropriate *ex parte* communications thereby became inappropriate and indistinguishable

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[19] The Manager's involvement in the preparation of the report led defendants to file, "Objections to the Panelists Serving as Testifying Experts and to their Report" *in camera* on November 7, 1995 and again with Defendants' Status Report on May 3, 1996. (App. Ex. (I) L, (II) H.) Defendants objected on the grounds that "[n]otwithstanding the demarcation of roles under the Agreed Order, the Manager was substantially responsible for drafting the Panel's Report." ((App. Ex. (I) L, (II) H.) Defendants' expert submissions and objections were submitted *in camera* on November 7, 1995, because of plaintiff's announced

from those between Judge Duff and the panelists. While Judge Duff and the Manager have refused to disclose the substance of their *ex parte* communications, they are concededly numerous and frequent and establish another spoke in the wheel.

II. COMMUNICATIONS AMONG THE OTHER PARTIES TO THE ALLIANCE

With Judge Duff as the hub, the other participants in the alliance – constituting the spokes – communicated among each other. The partial disclosures to defendants alone show the communications to have been numerous and varied. Those communications establish that the participants exceeded their defined roles in the case, thus exacerbating the impropriety of their *ex parte* communications and Judge Duff. The documents, as described in detail below, show:

- that plaintiffs' counsel and Mark Heyrman continued after the filing of the complaint to share their thoughts and strategies about the legal and factual aspects of this case behind the scenes, fully vindicating defendants' characterization of Mr. Heyrman as a *de facto* plaintiffs' lawyer;
- that during this same period, Mr. Heyrman, the panelists and the Manager freely communicated about the panel's investigation and draft report and about the key legal contentions in this case, notwithstanding the agreed proscriptions on Mr.

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intention *not* to disclose expert materials on that date despite the Judge's order at the September 27, 1995 hearing. (App. Exs. (I) N, Q at 12-13.)

> Heyrman's *ex parte* contacts with the panelists and on their sharing the fruits of their labors with any person not a party to this case; and
>
> - that the panelists – in particular, Dr. Okin – successfully put plaintiffs' counsel in touch with other advocacy groups and attorneys to assist plaintiffs in discovery and trial preparation and to help plaintiffs try to come up with theories to overcome their key legal obstacles in the case.

In sum, plaintiffs' counsel and the court-appointed panelists availed themselves of a back door to coordinate their strategy; by drawing Judge Duff into their circle, the panelists opened a back door for plaintiffs' counsel to the Judge.

Prior to the September 7, 1994, meeting, the panelists had several communications with Mr. Heyrman. A January 27, 1994, memorandum from the Manager's Assistant to the panelists noted that "Mark Heyrman endorsed the idea of a mini-longitudinal study." (App. Ex. (IV) B.) The Manager's reports mentioned a dinner with the panelists and Mr. Heyrman to discuss the "Guidelines" for the panel's investigation in mid-February 1994 and other discussions on the same topic in March 1994. (App. Exs. (IV) C, E.) In a February 27, 1994, memorandum to the panelists, Mr. Heyrman described his comments at that dinner, which go to a key legal issue in the case – mental health services in the community outside State facilities:

> As we discussed over dinner, the Defendants are reforming the community mental health system backwards. That is, they are looking first to front door screening before they get around to making sure that patients being discharged get

> services that are reasonably calculated to enable them to survive in the community. . . .
>
> My efforts have been directed at trying to make sure that the Department will have to take into its hospitals almost anyone it can't treat in the community by providing a standard and procedure through which one can challenge a denial of admission. I am hoping that this will pressure the Department to appropriately fund the community agencies in order for its reform not to backfire and end up with more not fewer hospitalizations. At the same time, we have tried, so far unsuccessfully, to force them to mandate in the regulations that assertive case management be available in every catchment area.

(App. Ex. (IV) PP at 5.)

When defendants learned of Mr. Heyrman's involvement with the panel (although not the substance of his communications), they objected in an April 28, 1994, meeting with the Manager and plaintiffs' counsel. (App. Ex. (IV) F.) Because of Mr. Heyrman's adverse posture, defendants "commented that Mr. Heyrman's communications with the Panel ought to be subject to the same restrictions applicable to communications with counsel for the parties under paragraph 6 of the appointment order." (*Id.* at 7.) Subsequently, the Manager agreed "that Mr. Heyrman will observe a proscription on any further *ex parte* contacts between him and the Panel or its consultants." (App. Ex. (IV) G.) Neither the plaintiffs' counsel

nor Judge Duff expressed any disagreement with this proscription.[20]

Nevertheless, Mr. Heyrman continued clandestine communications with the panelists on the issue of community services and how the panelists would treat them in the report. A December 3, 1994, fax from Ms. Southerland to Ms. Kinsley describes "Mark's Comments" on an apparent draft.[21] (App. Ex. (IV) N.) The comments include a line: "Central critique of department's reform is that focus is on front door, should be on back door." (*Id.*) On this document are handwritten notes: "Marti, as I wrote these up they are probably too minimalist to help – probably one of us should call Mark and talk about community findings. . . . " (*Id.*) Other attached but undated handwritten notes are entitled, "1 hr. Mark Heyrman." (*Id.*) The notes contain suggestions for "tying together . . . [the] community to the hospital piece." (*Id.*) Also attached are typed "Comments on System of Care," suggesting a way to connect "System Reform" and "Community Capacity." (*Id.*)

After the report was written, Mr. Heyrman continued his communications. He improperly received from plaintiffs' counsel a copy of defendants' comments on the draft report, which were to be kept confidential until trial.

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[20] Plaintiffs have obtained an affidavit from Mr. Heyrman stating that the Manager advised him "that this letter was mistaken, that the court had entered no order barring such contact and that the parties had not agreed to such a bar," but no one let defendants in on this secret. (App. Ex. (III) K at 15.)

[21] By allowing Mr. Heyrman to view a draft, the panelists were violating the Agreed Order. (*See* text *supra* at 7.)

(App. Ex. (IV) P.)[22] In a September 1995 memo from Mr. Heyrman to the Manager following completion of the final report, Mr. Heyrman argued for a broad reading of the obligations of the Department of Mental Health and Developmental Disabilities (DMHDD). (App. Ex. (IV) S.) The purpose of the memo was to read provisions of the Illinois DMHDD Act together so as to create a legal argument that "anyone who presents herself to a state facility and is evaluated or examined for the purposes of admissions" or "has been discharged from a state facility" is entitled to services. (*Id.*)

Mr. Heyrman also received copies of panelists' communications with the Judge. Mr. Heyrman received copies of the November 27, 1995, memo from Dr. Okin to the Manager and the December 7, 1995, letter from Dr. Okin to Judge Duff. (App. Ex. (IV) V, W.) Dr. Okin sent his November 27, 1995, memo to Mr. Heyrman with a memo that read: "Enclosed is a copy of a note I jotted to Norval. Feel free to pursue any of the ideas you feel are worthwhile. It was truly comforting to talk with you the other night." (App. Ex. (IV) V.)

The panelists also coordinated with the MHAI. Earlier on the day of the September 7, 1994, meeting with Judge Duff, Ms. Knisley and her consultant met with Jan Holcomb and two others from the MHAI. (App. Ex. (IV)

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[22] Under the Agreed Order only counsel for the parties or their consulting experts could obtain copies of these comments prior to trial. (*See* text *supra* at 7-8.) At best, plaintiffs' counsel's disclosure of defendants' comments to Mr. Heyrman shows that plaintiffs' counsel treated Mr. Heyrman, a lawyer, as their consultant – a *de facto* plaintiffs' attorney.

J.) "We [Ms. Knisley and her consultant] had a wide ranging discussion of the Association's advocacy efforts. From their perspective, key issues in securing desired system change, intended emphasis of their expanded role in community oversight and the expert panel's approach and impressions.[sic]" (*Id.*)

Subsequently, Mr. Heyrman coordinated between the MHAI, the panelists and plaintiffs' counsel. Mr. Heyrman appeared at the first of a series of MHAI "public hearings" on the panel's report on January 17, 1996. (App. Ex. (IV) EE.) A copy of the agenda for the hearing was found in Dr. Okin's files. (Ap. Ex. (IV) FF.) Mr. Heyrman's part of the program was "Summary of Expert Panel Report Findings," and in the course of his remarks he said this:

> Now the obvious question is, why aren't the experts who wrote this report here to describe its contents, and the answer to that is, they are not permitted to comment publicly, because this is prepared and is part of ongoing litigation and they've been prohibited from doing so. Therefore, I was pressed into service, but I would ask you all to note, that I had *almost* nothing to do with the writing of this report, and thus, my duty here today is fairly straightforward.

(*Id.* [emphasis add])[23]

On January 21, 1996, Mr. Heyrman wrote a memo to the panelists that said:

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[23] The transcript was sent to Mr. Heyrman with a handwritten note from Dr. John Day, asking if "Legislators," "Ben" and "Media" should get copies. (App. Ex. (IV) FF.)

> Enclosed are some materials I thought you should have. The January 17th hearing had its ups and downs. The former patients and their families were wonderful. Dan Lewis and the union person were terrible. I think MHAI has learned from this and the next one (scheduled for February 20th in Springfield) will go better.

(App. Ex. (IV) HH.)

Following that second MHAI hearing, Mr Heyrman wrote the panelists a "K.L. Update":

> 1) Enclosed are some clippings generated from our second hearing in Springfield. It went much better than the first. We are doing a third in Alton on April 2, 1996.
>
> 2) Discovery is going very well according to Ben [Wolf, from the ACLU].

(App. Ex. (IV) LL.)

Mr. Heyrman amplified that last statement in another "K.L. Update" memo he sent to the panel and the Manager on March 7, 1996:

> From time to time I have been providing Ben Wolf with information about current conditions inside DMHDD. Enclosed are some notes from my most recent conversation with him.

(App. Ex. (IV) MM.) Enclosed were three pages of single-spaced notes describing possible tactical and strategic attacks against the Department, certain facilities, and one of defendants' trial experts, William Reid. (*Id.*) At the same time, Mr. Heyrman was helping Jan Holcomb of the MHAI draft a letter to William Reid, arguing plaintiffs' case. (App. Exs. (IV) NN, OO.) And after Mr. Heyrman

comments were incorporated, an employee of MHAI sent a copy of the letter to Ben Wolf – plaintiffs' counsel – asking for "feedback concerning the enclosed information." (App. Ex. (IV) OO.) A copy of this letter to Mr. Wolf was found in the Manager's files. (*Id.*)

Mr. Heyrman was not the sole conduit between the panelists and plaintiffs' counsel. Another conduit was established at Dr. Okin's initiative with advocacy groups on the East Coast. On the same date that Dr. Okin was advising Judge Duff on release of the report and political pressure, he sent a memo to Ira Burnim of the Bazelon Center for Mental Health Law and Clarence Sundram of the New York State Commission on Quality of Care, seeking guidance in fending off defendants' anticipated attacks on the panel's report. (App. Ex. (IV) X.) The December 7, 1995, memo encloses the not-yet-released report and "relevant portion of state statute [sic] with an analysis by Mark Heyrman, an attorney on the faculty of the University of Chicago Law School and a good guy." (*Id.*)

In the memo, Dr. Okin requests Messrs. Burnim and Sundram to comment on the following:

1. the quality and persuasiveness of the Report, including our methodology and the way we have tried to derive a right to treatment in the community from the right to treatment in state hospitals.

2. your opinion as to whether the state statute which confers a right to treatment in the least restrictive alternative (enclosed) can be used in federal court. Is this made more

> difficult by the fact that the original complaint fails to address this issue? Would it help if the complaint were amended, or is it too late for this?
>
> 3. Might the Justice Department be interested in this case?
>
> 4. If Ben Wolf asked for your assistance, would you be interested?

(*Id.*)

On January 25, 1996, Mr. Burnim wrote back with two and a half pages of single spaced text regarding the first two questions. (App. Ex. (IV) II.) As to the last question, Mr. Burnim wrote:

> Claudia Schlosberg, of my office, is compiling a set of materials from *Wyatt* for Ben Wolf about JCAHO and about Dr. Gualtieri [one of defendants' expert witnesses]. I'll send you a list of what she is sending Ben and also send you selected materials from the list.

(*Id.*) Dr. Okin's files contain a letter, dated January 19, 1996, to Ben Wolf from Claudia Schlosberg of the Bazelon Center for Mental Health Law. The letter encloses materials intended to attack the credibility of Dr. Gualtieri. (App. Ex. (IV) GG.) And Dr. Okin's file also contains Mr. Heyrman's March 7, 1996, memo to the panelists, in which he advised: "Ben [Wolf] has spoken with Judith Preston at the Justice Department about joining this litigation. He was advised that they will consider this option." (App. Ex. (IV) MM.)

III. THE COVER-UP

Throughout this case, Judge Duff has utilized his powers to prevent defendants from learning of this strategic alliance. Even though the Agreed Order granted counsel a right to receive "any and all information provided the Panel, its consultants or the Manager . . . upon request" and although federal law entitles litigants to full disclosure of the work product of testifying experts (see text *supra* at 5; App. Ex. (I) G ¶ 5(a), (II) A, (II) F.), Judge Duff has stymied defendants' requests for expert disclosures for two years. Further, after the information about the alliance leaked out, Judge Duff used all his powers to plug those leaks to prevent further disclosures.

A. The Cover-Up Before Defendants' Motion for Recusal

Judge Duff has repeatedly denied defendants' attempts to obtain the data and information on which the panel's report was based. A brief chronology of defendants' attempts follows:

- In a letter dated May 20, 1994, defendants repeated their proposal from a meeting on April 28, 1994, that "a centralized record of all aspects of the expert's investigation should be maintained" in accordance with the disclosure terms of the Agreed Order. (App. Ex. (IV) F.)
- In response to the Manager's request or a "proposal regarding maintenance of the records collected and generated in the course of the expert investigation," defendants confirmed to the Manager by letter dated June

10, 1994, that counsel for defendants would provide a storage and distribution point for all files received, generated and copied by the Manager and the panel. (App. Ex. (IV) G.) But, as Ms. Knisley's file note recites, that request led to a "rather heated exchange between the Judge and the defense attorneys" in an in-chambers conference on June 10, 1996. (App. Ex. (IV) H.) Ms. Knisley records that Judge Duff "would not allow our draft materials to the guidelines and investigation, which he considers work product, to be collected." (*Id.*)

- Following release of the panel's report on January 25, 1995, defendants informally sought production of the panel's factual support for their opinions. The panelists and the Manager were unwilling to do so without Court approval. (App. Ex. (II) A at 3.)

- On May 25, 1995, prior to the time that they were to submit comments on the draft report, defendants formally asked the Court for the panelists' information by motion. (App. Ex. (I) I.) Plaintiffs neither opposed nor supported defendants' motion. (*Id.* at 3-4.) Judge Duff refused to allow discovery, telling defendants that "[t]here is no place in that agreement that I can see that you have a right now to go down and examine the particulars of [the panel's] research." (App. Ex. (II) B at 11.) Justifying his action because he felt the parties were in a settlement posture at the time, Judge Duff's remarks suggested that he thought settlement would more likely occur if defendants were *not* permitted to

examine the foundation of the panel's report. (*Id.* at 13-15.)

- On September 27, 1995, Judge Duff again denied defendants discovery of the panelists, stating: "You are not going to be allowed to challenge the experts that you chose. They are the Court's experts. They won't be challenged." (App. Ex. (I) K at 21.) He further disallowed depositions of the panel, telling defendants, "I am not going to let you depose them at this time." (*Id.* at 22.)

- On December 21, 1995, after public disclosure of the report, defendants filed a Renewed Motion for Immediate Disclosure of Information Considered or Received by the Panel. (App. Ex. (I) R.) Plaintiffs again filed no opposition. (App. Ex. (I) T at 3, 10.) Judge Duff orally granted this motion, saying "Your motion is allowed." (App. Ex. (I) T.)

- Defendants subsequently submitted to Judge Duff a written order confirming his December 21, 1995, ruling; the order was not acted upon. (App. Ex. (I) U.)

- Defendants again delivered the confirmatory written order in open court on February 1, 1996. (App. Ex. (I) W at 4.) Judge Duff did not sign it, in part claiming a concern for "whistle blowers," and saying "I don't remember saying this, and perhaps I don't remember what's included when it says 'immediate disclosure of information received or considered by the expert panel.' I don't know how broad that is, so I think I really should look – it sounds very broad and I think I really should look at that motion." (App. Ex. (I) W at 4-6.)

- At a hearing on February 15, 1996, Judge Duff again denied defendants' motion for disclosure of the panel's information. (App. Ex. (I) X at 13, 21.) "[T]he work that the Court's witnesses did in gathering information . . . is work product and if those people are not going to take the stand, there is no necessity for them going into enormous details as long as there is credibility to the development of their information over the years. . . . [M]uch of that data was gathered under the aegis of the Court . . . " (*Id.* at 13.)

- Defendants again sought the panel's information with their Motion for Full Expert Disclosure, filed March 21, 1996. (App. Ex. (II) A.) Defendants clarified that they were seeking not only the panel's supporting data and information but specifically any documents pertaining to *ex parte* communications with Judge Duff. (*Id.*) Judge Duff ordered briefing on the motion after telling defendants that their motion was "very bold, and I think there is no law to support part of what you say you seek." (App. Ex. (II) B at 4, 21.)

- Defendants' motion was finally heard on May 10, 1996. At that time, Judge Duff allowed some of the data and information to be provided. (App. Ex. (II) K at 26-45.) But he refused to allow disclosure of his *ex parte* communications with the panel, stating that he, did not think he has "had any conversations with them in particular that were anything other than administrative and that's been almost entirely through Professor Morris" (*Id.* at 12-13.) Later, the Judge had this interchange with plaintiffs' counsel:

> MR. WOLF: Yes, I would like to just briefly respond, Your Honor. The Court has already said today and earlier that your conversations with the Court's experts were of an administrative nature, so it seems to me that's the end of the affair.
>
> THE COURT: No, I didn't even say that.
>
> MR. WOLF: Well, then I misheard you.
>
> THE COURT: I have had very little communications with them except a couple of social occasions, nothing other than that.

(*Id.* at 76-77.)

Plaintiffs' counsel, too, have contributed to the cover-up. Although plaintiffs have cited no legal support for Judge Duff's bar on disclosure of his *ex parte* communications with the panel – either on work product or judicial privilege grounds – they continue to support his refusal to allow such discovery. (See, e.g., App. Ex. (II) K at 33-34.) While, agreeing that the parties could discover the "information" on which the panel based its opinions, they protested defendants' right to "full disclosure." (App. Ex. (II) D at 4, 8.) Citing only a desire "to provide the parties with access to relevant information relied upon by the panel in reaching its conclusions without undue burden, delay or expense," plaintiffs have facilitated Judge Duff's denial of defendants' attempts to discover the panel's information. (*Id.* at 4.) Further, even as they concede that the Agreed Order provides protection

for potential whistle blowers, plaintiffs have not questioned Judge Duff's rulings on such issues. (*Id.* at 8; App. Ex. (II) W at 5-7; App. Ex. (II) X at 18-19.)

Although they contend that Judge Duff's *ex parte* contacts do not amount to improprieties, plaintiffs and Judge Duff argue inconsistently that the Recusal Motion is not timely because the existence of some (though not all) of these contacts were disclosed earlier. (App. Ex. (III) J at 16-19; Opinion at 4 n.5.) As shown, this argument is ill-taken because defendants have not received full disclosure of these contacts even now, despite having sought disclosure for two years. Defendants have had prior suspicions of substantive contacts, and defendants have objected to the panelists testifying as trial witnesses and sought hard evidence of the substance of the contacts, but the Judge and plaintiffs stonewalled defendants until immediately before trial. (See text *supra* at 35 n.19; App. Ex. (I) L.) When, after two years, defendants finally received documents revealing the actual substance of these contacts, they realized that excluding the panelists' testimony would be insufficient and moved immediately for recusal. (See text *supra* at 10-11.)

B. The Cover-Up After Defendants' Motion for Recusal

Judge Duff succeeded in fending off all of defendants' requests for disclosure until just before trial. Then some evidence leaked out. Once the Judge learned of this, he attempted to put the lid back on:

- On June 13, 1996, defendants filed their Discovery Motion for the remainder of the

expert panel's documents viewed on June 12. Judge Duff contended that his communications with the Manager were privileged: "I am a judge, and Dr. Morris is an officer of the court just like one of my law clerks." (*Id.* App. Ex. (II) M at 38.)

- On June 18, 1996, the Judge conducted an inquiry into how the documents were leaked. (App. Ex. (II) W at 7-9, 20-21, 77-79.) The Judge said "I said we should meet today after you all had addressed a couple of matters to me, one of which is that I could not understand under what basis the defendants obtained some of those documents from Mr. – from Professor Morris. . . . I was sure I had not entered an order to that effect." (*Id.* at 7, 20.) Later he said, "I specifically know that there are at least two occasions in the record, . . . where I very clearly said that certain things were not to be given, work product, privilege and a number of other categories that I specifically stated." (*Id.* at 78.)

- On June 18, 1996, the Judge also refused to consider defendants' Supplemental and Second Supplemental Appendices and Affidavit as filed. (*Id.* at 42, 75, 93.) The Judge said to defendants "you don't have leave to file until I find out what you want to file. I'm not going to let you continue to pile up this record with my just being here subject to your whims." (*Id.* at 42.) Judge Duff ordered that defendants file a formal written motion for leave to file these materials, which they did on June 19. (App. Ex. (III) A.) The Judge refused to rule on that motion then but he

later issued a minute order allowing the filing, entered of docket June 21, but dated June 19. (App. Ex. (III) C at 70; App. Ex. (III) F.)

- On June 19, 1996, the Judge took up the subject of certain subpoenas that had been served on the panelists and the Manager on June 10 and 15, 1996. (App. Ex. (III) C at 22.) Those subpoenas in part sought access to computer data held by those individuals, as well as information about *ex parte* communications with the Judge about the substance of the report. (*Id.* at 22, 25-27, 36-41.) The Judge effectively quashed those subpoenas, saying "If what you're doing is conducting discovery for the motion that you made for me to be recused, I don't think it's appropriate. . . . The motion you made under the law, you should have had all the information you needed before you filed it. . . . Then as far as these things are concerned, these subpoenas, they're not [of] any particular relevance to the case." (*Id.* at 39, 41-42, 48.) On June 19, 1996, the Judge reiterated his intention not to permit any disclosure of his *ex parte* communications with the Manager *or* the panelists. (*Id.* at 75, 80-81.)

- On June 20, 1996, the Judge further effectively quashed subpoenas served on plaintiffs' counsel and Mark Heyrman for their documents. (App. Ex. (III) E at 78-83.)

- On July 2, 1996, after defendants refiled their reply memorandum and third supplemental appendix pursuant to the Judge's June 26, 1996 order, the Judge changed his mind and struck those materials. (See text *supra* at 15.)

Defendants have been forced to file their Recusal Motion and this petition with the evidence that leaked out in late stages of trial preparation. Defendants can only guess at what might be discovered if full and fair disclosure were permitted by an unbiased referee.

ISSUES PRESENTED AND RELIEF SOUGHT

1. Whether Judge Duff, whose impartiality must reasonably be questioned, should be disqualified under 28 U.S.C. § 455(a).

2. Whether Judge Duff, who has personal knowledge of disputed evidentiary facts concerning the proceeding, should be disqualified under 28 U.S.C. § 455(b)(1).

3. Whether Judge Duff, who has a personal bias or prejudice concerning defendants and in favor of plaintiffs, should be disqualified under 28 U.S.C. § 455(b)(1) or 28 U.S.C. § 144.

Defendants respectfully request that this Court disqualify Judge Duff from these proceedings.

REASONS FOR GRANTING WRIT

I. Mandamus Is An Appropriate Remedy.

The Seventh Circuit has held that, when a judge denies a motion to disqualify himself under section 455(a), immediate application to this Court for a writ of mandamus is the moving party's sole recourse. *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985), *cert. denied*, 475 US 1095 (1986). *See United States v. Masters*, 924

F.2d 1362, 1367 (7th Cir.), *cert. denied*, 500 U.S. 919 and *cert. denied sub nom*, 502 U.S. 823 (1991); *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 713 (7th Cir. 1986). This is so in order to prevent injury to the public perception of the judiciary before it has a chance to occur. *United States v. Balistrieri*, 779 F.2d at 1205. As the *Balistrieri* court stated:

> [T]he harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. Prevention in such circumstances is clearly preferable to attempts to cure.

(*Id.*)

Further, in a case such as this one in which the grounds for recusal based on sections 455(a) and (b) are closely intertwined, mandamus is a proper way to address both grounds for recusal. *See Union Carbide Corp. v. U.S. Cutting Service, Inc*, 782 F.2d at 713; *see also In re School Asbestos Litigation*, 977 F.2d 764, 775-77 (3d Cir. 1992) (taking jurisdiction on mandamus of both 455(a) and 455(b) grounds for disqualification).) And since the section 144 and the section 455(b)(1) grounds overlap, the Court should consider reviewing all issues at once, rather than treating the section 144 issues separately after appeal.

Mandamus is an appropriate remedy to address defendants' claims. "Appellate review of such claims is *de novo*," at least under section 455. *Taylor, supra*, 888 F.2d at 1201.

II. Judge Duff's Appearance Of Impartiality Must Be Questioned.

Under section 455(a), a judge should "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The statute's purpose is broad: "The general language of subsection (a) [of section 455] was designed to promote public confidence in the integrity of the judicial process by replacing the subjective ['in the opinion of the judge'] standard with an objective test." *Liljeberg v. Health Services Acquisitions Corp.*, 486 U.S. 847, 858-60 and n.7 (1988) (citing S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993).

Congress enacted section 455(a) in order to allay public fears about the judiciary. To promote public confidence in judicial integrity, section 455(a) thus seeks "to avoid even the appearance of partiality." *Liljeberg*, 486 U.S. at 860. The Supreme Court has opined that the courts "must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice." ' " *Id.* at 864 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)); *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 1162 (1994) (citing several cases to the same effect) (Kennedy, J., concurring). "Impartiality and the appearance of impartiality in a judicial officer are the *sine qua non* of the American legal system. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, . . . the United States Supreme Court stated: 'Any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.' " *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 98

(3d Cir. 1992); *see In re School Asbestos Litigation*, 977 F.2d at 782 ("[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.").

The Supreme Court thus has recognized that section 455(a) provides an objective test of impartiality:

> If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists. . . . Under Section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Liljeberg, 486 U.S. at 860-61; *Liteky*, 114 S.Ct. at 1153-54 (Subsection (a) is "to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required wherever 'impartiality might reasonably be questioned.' "). As several courts have said, "[i]n applying § 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue." *Cooley, supra*, 1 F.3d at 993 (citing *Hall v. Small Business Adman.*, 695 F.2d 175, 179 (5th Cir. 1983)). Indeed, in *Liljeberg*, a judgment after a bench trial was vacated ten months after entry, even though the trial judge had no actual knowledge of his personal financial interest in the outcome. 486 U.S. at 864.

Because of this concern for the appearance of impropriety, the courts have recognized that section 455(a) "applies to the varied and unpredictable situations not subject to reasonable legislative definition in which judges must act to protect the very appearance of impartiality." *Cooley*, 1 F.3d at 992. The facts in this case are unusual and egregious. They point to the conclusion that Judge Duff, to an objective observer, has lost the appearance of impartiality.

In *In re School Asbestos Litigation*, the Third Circuit disqualified a judge who had "attended a predominantly pro-plaintiff conference on a key merits issue" and received a "Hollywood-style 'pre-screening' of the plaintiffs' case." 977 F.2d at 782. The judge's expenses at the conference were largely defrayed with "court-approved funds." *Id.* The court noted that

> [the district court judge's] comments at one pretrial conference might be read to suggest that he believed that the defendants' products clearly were dangerous. . . . Although it would not necessarily be improper for him to reach that view through the adjudication of record-based motions, assuming that the record supported it, reasonable but suspicious minds might question whether he had already concluded this issue prior to trial and whether his views were influenced by the conference.

Id.

The facts of *In re School Asbestos Litigation* are instructive. In that case, after attending the conference, the judge recognized that others might reasonably suspect his partiality and accordingly excluded the expert testimony of

those who had participated in the conference. (*Id.* at 783.) The appellate court disqualified him nonetheless, stating that "we believe that a reasonable person might still suspect a prospective taint notwithstanding the district court's nonstatutory remedy." *Id.* In this case by contrast, rather than acting as a passive observer at a pre-screening of expert testimony in a public forum, Judge Duff has conducted a pre-screening of expert testimony in private, *ex parte*. Indeed, he has taken an active role in pre-approving the expert panelists' pro-plaintiff testimony, ensuring that their methodology would withstand legal challenge. But Judge Duff has offered neither to exclude the court-appointed experts nor to recuse himself; rather, he would sit in judgment as the trier of fact in this case, over the same expert report that he helped craft to defeat defendants' *Daubert* challenge and their entire defense.

In addition, a violation of the Code of Judicial Conduct will add to the appearance of impropriety. In *In re School Asbestos Litigation*, the court of appeals noted that "appearances of partiality are likely if conduct is inconsistent with the related canons of judicial ethics regarding judges' out-of-court associations with actual and potential litigants." *Id.* at 783. In this case, Judge Duff's *ex parte* contacts with the Manager, the panelists, plaintiffs' counsel and their allied advocacy groups violate the Code of Judicial Conduct. Under Canon 3 of the Code:

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

> (a) Where circumstances require, ex parte communications for scheduling, administrative purpose or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: . . . .
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. . . .
>
> (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Code of Judicial Conduct, Canon 3(B)(7) (1990). Section (e) plainly provides that allowance of *ex parte* communications is the exception, not the rule. The Commentary to Canon 3 reinforces that reading: "In general, however, a judge must discourage ex parte communication and allow it only if all criteria stated in Section 3(B)(7) are clearly met."

In this case, Judge Duff has had unreported *ex parte* communications with the panelists, the Manager, plaintiffs' counsel and their allied mental health advocates. These contacts have gone far beyond the "administrative" purposes that the Code allows – but only with full disclosure. The contacts have been shown to have influenced Judge Duff. Yet, even in the face of such evidence, as well as the plain language of the Agreed Order, Rule 706, and the Code of Judicial Conduct, Judge Duff refuses to admit that a reasonable person could question his impartiality.

In fact, Judge Duff has repeatedly articulated the wrong standard by which he should decide defendants' motion. First, he questioned the veracity of certain factual

assertions contained in Ann Patla's Affidavit Pursuant to section 144, ignoring the uncontroverted case law holding that the presiding judge could not determine the truth of factual assertions contained in such an affidavit.[24] *See, e.g., United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir. 1985). Second, rather than using the objective standard established by the cases, Judge Duff has implied that only extreme circumstances mandate his recusal. In a June 18, 1996, hearing after the filing of defendants' Recusal Motion, Judge Duff stated: "it isn't one of those things where I was caught taking a bribe on State and Madison or something by one of the escaped members of the class." (App. Ex. (II) W at 75.) Later in the same proceeding, Judge Duff said: "[W]e will have to evaluate it to see, but at the moment it isn't like I was caught with my pants down or that somebody walked by with Chaucer's red hot poker." (*Id.* at 85). And again at that hearing: "I mean, if I just shot one of the lawyers, maybe Ms. Cottle, then surely you could bring a motion to recuse myself, but I haven't. . . . " (*Id.* at 94.) He said much the same thing the following day:

> If you have something that you can say that deserves to be followed up, why, we will follow

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[24] Plaintiffs attempt to exclude Ann Patla's Affidavit from consideration by claiming that the Affidavit of Timothy Patenode, filed with the Recusal Motion, is the section 144 affidavit. (App. Ex. (III) at 21-22.) Plaintiffs are wrong; the Patenode Affidavit was submitted to describe the documents seen but not copied on June 12 that plaintiffs prevented defendants from obtaining in time for the filing on June 14. (See text *supra* at 10-11; App. Ex. (II) R.) Judge Duff granted defendants leave to file the Patla Affidavit *nunc pro tunc* to June 14, 1996. (App. Ex. (III) F.)

> it up, but you haven't got anything that says that I have shot anybody or taken a bribe or done any of those horrible things that people do.

(App. Ex. (III) C at 80.)

Under such an extreme view of when recusal is warranted, it is no wonder that Judge Duff has refused to rule on defendants' Motion for Recusal in the face of his own manifest improprieties.

III. Judge Duff's Personal Knowledge Of Disputed Evidentiary Facts And His Bias Or Prejudice Against Defendants Also Require Disqualification.

Sections 144 and 455(b)(1) require recusal when a judge "has a personal bias or prejudice concerning a party." Section 455(b)(1) further requires disqualification where a judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." Sections 144 and 455(b)(1) both require recusal in this case.

In *Liteky v. U.S.*, 510 U.S. 540, 114 S.Ct. 1147 (1994) (Kennedy, J., concurring), the Supreme Court defined bias or prejudice in a recusal context as

> a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities).

Id. at 1155.

The definition in *Liteky* applies equally to this case. Here, Judge Duff has repeatedly demonstrated his unfavorable disposition towards defendants, a disposition that is wrongful because it rests upon knowledge Judge Duff has learned through his *ex parte* communications with the panelists and others. In this case, not only did Judge Duff privately screen the testimony of the expert panelists in a meeting on September 7, 1994, but he also advised the panelists on the substantive methodology of their report – in order to protect it from party challenges. Further, Judge Duff has entertained and answered at least one *ex parte* communication from an advocacy group presenting him with allegations about the conditions within the State as mental health facilities – conditions that defendants would dispute. The knowledge that Judge Duff has gained through such *ex parte* contacts with the plaintiff-influenced panelists, and his receipt of – and *ex parte* response to – a letter from an advocacy group closely allied with both plaintiffs and Mark Heyrman in this case, are patently prejudicial.

Judge Duff's bias against defendants has manifested itself in a number of ways. First, as detailed above, he has continuously shielded the panelists from requisite disclosures to defendants. This obstruction of lawful inquiry is in violation of paragraph 5(a) of the Agreed Order, Rule 706 of the Federal Rules of Evidence, Rule 26 of the Federal Rules of Civil Procedure and Canon 3 of the Code of Judicial Conduct. Second, he has repeatedly blamed only the defendants for the lack of settlement in this case – even though defendants drafted a settlement proposal to which plaintiffs have yet to respond.

Judge Duff has evidenced this bias in a number of comments in open court. At a June 13, 1996, hearing, Judge Duff impugned the good faith of Howard Peters, the Governor's Deputy Chief of Staff, for both sides' inability to settle the case:

> Now I also told you, you brought Mr. Peters in here, – he is informed, he is intelligent, he has got a great deal of political savvy, . . . but I told you or Mr. Patenode that as far as I was concerned, he had not been straightforward with me. He sounds wonderful, but nothing has happened, okay? And so I have been around a long time, and Mr. Peters is a very competent bureaucrat. He is very persuasive, he is suave, he is intelligent, but nothing happens, okay? And I'm not satisfied with that. And if he is the representative of the governor in this instance, I don't think he is doing his job for the governor, and I think that I have a right to talk to the governor.

(App. Ex. (II) M at 25.)

On June 18, 1996, Judge Duff again showed his investment in the panel's report, accepting a panelist's statements as fact and blaming defendants for not settling:

> Now, nobody can settle this case without [the Governor's] permission. I don't think he understands even now all the problems, I don't. And Ms. Patla [, Director of DMHDD,] came in in her first meeting with us and she got into a conversation, and you were there, I think. She got into a conversation with Ms. Knisley and she made some comments about the circumstances of another state that were supposed to be accurate, and Ms. Knisley asked her a couple of questions

> which showed she didn't have any idea what she was talking about, and that's a fact. It was embarrassing, but we didn't point it out.
>
> Now, are you going to tell me that I have to accept all this, that you're really trying to settle this case? You're not and you haven't been for a long time, and that's okay too because I don't mind trying cases. That's why I get paid my outrageous salary.

(App. Ex. (II) W at 90-91.) The next day, Judge Duff again raised the issue of the Governor's personal involvement as somehow demonstrating defendants' – not the parties' – unwillingness to settle the case:

> The reason we wanted him in here was because I thought he could help us in the settlement if you really want to settle. You told me you really wanted to settle. I figured if you couldn't convince him that it was a good idea to settle, who could? But if he didn't want to settle, I kind of would have liked to have known about it three years ago and we would have [been] on trial two years ago, okay? I would have taken this case to trial long ago if there hadn't been so much time wasted on settlement negotiations, a large part of which I feel were not straightforward.

(App. Ex. (III) C at 52.)

More than simply blaming defendants for not settling the case, Judge Duff has apparently confused his role as a judge with a role as a legislator, seeking to take an active role in the negotiations of the case:

> Now, you folks are so rigid about the law on these things you don't understand that human

> beings have to talk to each other in order to understand each other well, and the rigidities of the law, the strictures of the law, the limitations of the law are not meant to inhibit or impede understanding between human beings. Negotiations, settlements, compromises are the grist of democracy.
>
> Now, if you understood that and you understood my role in it, you wouldn't be doing this, you would have had [the Governor] come up here if you could have and we all could have sat down in the same room together or he and I could have sat down with each other only.

(App. Ex. (III) C at 16.)

To the extent trial judges have even come close to Judge Duff's conduct, the cases confirm that communications between a court and a court-appointed expert witnesses must be disclosed and may not affect the fact-finding process. In *United States v. Green*, 544 F.2d 138 (3d Cir. 1976), *cert. denied, sub. nom. Tefsa v. United States*, 430 U.S. 910 (1977), the court of appeals considered whether the conviction of a defendant should be reversed on the grounds of *ex parte* communications between the trial court and a testifying expert retained by the court to opine on the defendant's competence. The Third Circuit reasoned that reversal was not required, but only because the trial judge was not the fact finder and because he put his conversations with the expert on the record and provided a full opportunity for cross-examination of the expert. *Id.* at 146-47 & n.16. The court of appeals further observed that the better procedure would have been to

include counsel in all communications with court-appointed experts: "Having counsel present during all communications is consistent with the adversary system's reliance on the efforts of opposing counsel, representing different viewpoints, to secure the most accurate results throughout the trial." *Id.* at 146 n.16. The court also cited "standards" for judicial behavior, stating: "[W]hat is required, however, are reins of restraint, that [the trial judge] not comport himself in such a way as to 'tilt' or over steer the jury or control their deliberations." *Id.* at 147 (citing *United States v. Libby*, 509 F.2d 428, 438 (1974), *cert. denied*, 420 U.S. 911 (1975)).

Green differs from this case in at least two respects: first, because full disclosure of all communications in fact occurred; second, because the district judge was not the trier of fact and the judge's *ex parte* conversations did not control the jury's deliberations. In this case, on the other hand, where Judge Duff sits as the trier of fact, the *ex parte* communications recently revealed to have already influenced him are patently prejudicial.

Jackson v. Fort Stanton Hospital & Training School, 757 F. Supp. 1231 (D.N.M. 1990), expressed much the same view as the Third Circuit in *Green*. Although the *Jackson* trial court communicated *ex parte* with a court-appointed expert, the communications occurred after a bench trial on the merits, and the court's subsequent actions were deemed to prevent any prejudice. The court placed in the court file copies of all written correspondence with the expert, provided to counsel a record of the telephone calls it had with the expert, including outlines of the conversations, and offered to give to counsel its notes of the

conversations and those of its law clerk prior to deposition. *Id.* at 1237. The court further advised the parties that, even if the expert provided information to the court, its notes of its conversations with the expert "contained the full extent of [his] knowledge of, and even [his] selection and interpretation of, that information." *Id.* at 1239. These actions preserved the parties' full rights to cross-examine the court-appointed expert on that information. In *Jackson*, reversal was not warranted because of a lack of prejudice to the parties. In this case, unlike *Jackson*, Judge Duff's persistent refusal to disclose, prejudicial *ex parte* communications should require disqualification.

CONCLUSION

As newly-revealed documents and other information show, it is as if Judge Duff stepped down from the bench, worked with expert witnesses on their direct examination and in anticipation of cross-examination and joined in private *ex parte* communications on how to achieve plaintiffs' strategic goals by means of litigation, settlement or political pressure. The same Judge now purports to resume his place on the bench and "independently" assess the testimony of these same witnesses and of other, opposing experts. Having stepped down from the bench and compromised his role as trier of fact, Judge Duff may

not resume his seat. Mandamus is appropriate to disqualify Judge Duff from hearing this case.

Respectfully submitted,

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No. 96-2641

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN THE MATTER OF: JAMES R. EDGAR, Governor of the State of Illinois and ANN PATLA, Director of the Department of Mental Health and Developmental Disabilities, Petitioners	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 92 C 5722 Judge Brian Barnett Duff

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PLAINTIFFS-RESPONDENTS' RESPONSE
TO DEFENDANTS-PETITIONERS' PETITION
FOR WRIT OF MANDAMUS

(Filed July 12, 1996)

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The undersigned, counsel of record for K.L., et al., Plaintiffs-Respondents furnishes the following list in compliance with Circuit Rule 26.1:

1. K.L., et al.

2. Not a corporation.

3. The Roger Baldwin Foundation of ACLU, Inc., Mayer, Brown & Platt, and Schiff Hardin & Waite.

/s/ Jeffrey W. Sarles

Dated: July 15, 1996

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INTRODUCTION

Defendants' Petition combines rhetoric and hyperbole with statements and events lifted out of context in an unsuccessful attempt to create an illusion of impropriety where none exists. Unhappy with the findings o. a panel of experts they agreed upon in advance, defendants have raised unsubstantiated and unsupportable allegations of judicial bias and partiality weeks before the scheduled trial of a four year old case. Their motion for recusal and petition for mandamus ("Petition") are a transparent effort to delay justice for thousands of mentally ill citizens of this State.

The parties agreed to an open, flexible process in which a panel of experts appointed by the court would have unlimited access to information and the right to speak *ex parte* with the parties, the court or anyone else they deemed appropriate except counsel of record. The parties also mutually invited the experts to participate in a wide range of formal and informal meetings and conferences, including *ex parte* discussions with top officials of the Illinois Department of Mental Health and Developmental Disabilities ("DMH"), in an effort to move the case toward settlement.

After agreeing in advance to this process, defendants now seek recusal because they do not like the experts' conclusions about the pervasive inadequacies in the Illinois mental health system. In doing so, defendants attempt to smear everyone but themselves who participated in the process by conjuring up an illusory scheme in which the district court is supposed to be at the "hub" of a complex conspiracy involving nationally acclaimed

experts (agreed upon by defendants), the distinguished University of Chicago Law School professor who managed the panel, plaintiffs' counsel, and mental health advocates.

Despite the escalating complexity of defendants' ever-evolving conspiracy theory, there is simply no evidence of bias or impropriety by the district court. For the reasons set forth below, this Court should deny defendants' petition for mandamus and clearly dispose of defendant's derogatory and unsubstantiated charges.

STATEMENT OF FACTS

Defendants' account of the history of this case bears little resemblance to the facts. Key charges are made without any citation to the record because there is no evidence to support them. As a result, it is necessary for plaintiffs to describe the procedural history of this matter in some detail, particularly the negotiations leading to the district court's entry of its Agreed Order to Appoint Experts and defendants' continuing efforts to avoid the testimony and report of the court's appointed panel of experts.

1. The Nature Of This Proceeding

On August 26, 1992, plaintiffs, a class of persons who are or will be institutionalized in mental health centers operated by DMH, filed a complaint against the Governor and the Director of DMH, pursuant to 42 U.S.C. § 1983,

seeking declaratory and injunctive relief. Pet. App. I (A).[1] The complaint alleged that conditions and practices in the State's facilities violate plaintiffs' constitutional rights to safety, freedom of movement, and adequate medical and psychiatric care and treatment.

2. Appointment Of The Expert Panel

a. Plaintiff's Motion for Court Appointment of an Expert Panel

Two weeks after they filed their complaint, plaintiffs moved pursuant to Federal Rule of Evidence 706 for appointment of a panel of experts to evaluate their allegations that mental health care provided by DMH is constitutionally deficient. Pet. App. I (B). Plaintiffs noted that "[c]ourt-appointed medical and psychiatric experts have been employed with great success both to facilitate settlement and to provide testimony at trial in cases involving institutionalized populations." *Id.*, at 1. Their proposal for a panel of experts was explicitly designed to facilitate a settlement or, in the absence of settlement, to assist in the efficient presentation of evidence at trial through testimony by acknowledged experts agreed upon by the parties. *Id.*, at 1.

Initially, defendants opposed the motion for appointment of a Rule 706 expert panel. Pet. App. I (C). After unsuccessfully moving to reassign the case to Judge

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[1] "Pet." designates defendants' Petition for a Writ of Mandamus; "Pet. App." designates the Appendix filed with the Petition, with the volume designated by a roman numeral and the document by a capital letter in parentheses.

Aspen, Pet. App. III (K), Exhs. 3 and 4, defendants changed their position and began negotiating with plaintiffs about court appointment of an expert panel. Pet. App. I (E). Following lengthy interviews with several potential experts, the parties agreed during the spring of 1993 to three proposed experts and to the text of a draft order appointing them. In that draft, the parties specifically agreed that the experts would have the flexibility to "express opinions on other matters beside custodial care and treatment." Pet. App. I (F), at 12. The draft agreed order was subsequently sent to the agreed experts for review.

b. Comments and Concerns of the Proposed Experts

In a joint response to the draft order, on May 6, 1993, the three proposed experts that the parties had agreed upon requested "clarification about particular issues," including whether they would be permitted to evaluate community care options. Specifically, the experts asked whether they would be permitted to determine

> what options exist to institutional care before and after hospitalization, to examine the treatment and placement recommendations of the professionals in the institutions, to review whether these recommendations are consistent with professional standards, and to assess whether adequate discharge plans are actually being implemented.

Pet. App. III (K), Exh. 5, at 1. The experts' willingness to accept the court's appointment was predicated on their understanding that this inquiry was within the scope of

their charge. They insisted that unless they could examine community placements, "it would not be possible to determine whether the institutions are carrying out certain of their intended functions or whether they are meeting minimally acceptable standards." *Id.*

In addition to seeking clarification concerning the scope of their inquiry, the proposed experts sought "clarification about matters of protocol." *Id.*, at 2. Most importantly, the proposed panel specifically requested that they "have access to the Judge, with or without the parties present." *Id.*, at 2-3. The parties assured the proposed experts that their concerns would be met, and later drafts and the final Agreed Order did so. *See infra.*

c. *Ex Parte* Court Interviews, Appointment of the Manager and the Issue of Whistleblowers

The parties' practice of permitting *ex parte* communications between the court and its experts began before the experts were even appointed. As part of the appointment process, the parties arranged *ex parte* meetings with the court so it could independently assess the commitment and expertise of each of the experts. Counsel for defendants took the lead in arranging these *ex parte* meetings. Pet. App. III (K), Exh. 6. As negotiations on an agreed order continued, problems of communication and coordination among the parties, the proposed experts and the court (*see, e.g., id.*, Exh. 7) led the court to propose – and the parties to agree – that Professor Norval Morris ("Manager"), a Professor of Law at the University of Chicago, and his assistant, Judith Cottle, would help the court to manage the expert panel's investigation.

On October 21, 1993, the parties each submitted proposed orders and statements summarizing their positions on their few remaining areas of disagreement. Pet. App. III (K), Exhs. 8 and 9. In their submissions, the parties agreed on the authority of the experts and the Manager to have unfettered *ex parte* access to the court. Indeed, both draft orders contained the following provision permitting *ex parte* contacts:

> The Panel and the Manager may communicate with the Court at any time without the inclusion of counsel.

Id., Exh. A to Exh. 8, at 7 ¶ 6; Exh. B to Exh. 9, at 6 ¶ 6.

In addition, the parties' submissions emphasized that a primary purpose of the court-appointed panel was to facilitate a settlement. Defendants stated, for example, that the panel's draft report was to provide "a basis for the parties to discuss a possible resolution of this case." *Id.*, Exh. 8, at 1. Defendants also recognized that the panel would be free to interview "*ex parte*, both party and non-party witnesses," and "members of the plaintiff class, their friends and family, as well as employees and officers of defendants, and even other mental health professionals in the community." *Id.*, at 9.

The parties' primary disagreement concerned plaintiffs' position that counsel should be able to communicate *ex parte* with the panel in order to pass on information from "whistleblowers" and others with relevant knowledge. Plaintiffs believed this was necessary to protect

such people from retaliation by defendants.[2] Defendants maintained that plaintiffs' counsel could protect whistleblowers simply by "advis[ing] the whistleblowers to contact the Panel or the Manager directly." *Id.*, at 10. With this one exception, there was clear agreement between the parties that the experts and Manager could communicate *ex parte* with the court, that the experts would have unfettered access to potential witnesses and interested third parties, and that counsel could direct persons with relevant information to the experts.

3. The Agreed Order

a. The Charge of the Panel

On November 10, 1993, the district court entered an Agreed Order appointing Dr. Robert Okin, Ms. Martha Knisley, and Dr. Leona Bachrach as its panel of experts ("the Panel").[3] Pet. App. I (G). The Agreed Order directed the panel "to investigate the practices, programs and policies of the [DMH] pertinent to conditions of care and treatment for mentally-ill persons in the custody of twelve [DMH] facilities." The Panel was specifically

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[2] Later events demonstrated the appropriateness of plaintiffs' concerns. After testifying at length during a deposition about historic and continuing inadequacies in the provision of services at DMH hospitals, Dr. Joseph Kleinplatz, Medical Director at the Tinley Park mental health facility, was placed on "administrative leave," leaving him effectively without a job. *See* Pet. App. III (E), at 63.

[3] Dr. Bachrach subsequently withdrew from the Panel due to personal scheduling problems, and the parties and the court agreed to proceed with a two-expert panel.

ordered to determine whether the Department's practices, programs and policies concerning health and mental care and treatment "represent a substantial departure from professionally accepted minimum standards, practices and judgments" and to "advise the Court as to any other facts or matters that the Panel finds, or the Panel believes the Court will find, significant in the consideration of the Panel's opinions." *Id.*, at 1-2. To fulfill its task, the Panel was empowered to "undertake any activities directed at obtaining information which is of a type reasonably relied upon by professionals in the field of mental health care." *Id.*, at 3. Thus, the Agreed Order responded to the concerns expressed by the experts that they be permitted to examine pre- and post-hospital care, or anything else, to the extent they deemed it appropriate.

In addition to its investigatory and reporting responsibilities, the Agreed Order gave the court specific authority to utilize the Panel in settlement discussions. In the event "the parties advance[d] to the Court a proposal for settlement of this Action," the Order authorized the court "to require the Panel to advise it as to the merits of such a proposal." *Id.*, at 2.[4]

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[4] The history of this case and language of the Agreed Order gives no support to defendants' suggestion (Pet. 21 n.10) that the Panel was authorized to review only settlement proposals made by the parties jointly. *See infra.*

b. The Manager and Ex Parte Communications

The Agreed Order recognized that the assignment of the Manager and Assistant was to be broad and flexible, authorizing them to "coordinate and facilitate the investigation and reports of the Panel" and to "report to the Court and the parties as to the progress and status of the Panel's investigation." *Id.*, at 4. Contrary to defendants' assertions (Pet. 6, 33), the Agreed Order did not designate Professor Morris as a "buffer" between the panelists and the court or restrict the ability of the court to communicate *ex parte* with its experts. In fact, the Agreed Order explicitly emphasized the right of the court to communicate with the experts:

> By appointing the Manager, the Court is not relinquishing its exclusive prerogative to instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report.

Pet. App. I (G), at 4.

The only restriction on *ex parte* communications related to communications between counsel and the Panel. On this issue, the Agreed Order took a compromise position that granted the Manager discretion to initiate *ex parte* communications with counsel if he believed it to be "of assistance to the Panel." *Id.*, at 8. The Manager was given broad discretion to conduct *ex parte* contacts with counsel and to limit disclosures of the substance of such conversations to opposing counsel "in the exercise of his own best judgment." *Id.*

Because the parties had agreed that the experts and Manager were to be otherwise unconstrained in their *ex parte* communications, the explicit language that was included in the draft orders regarding *ex parte* communication with the court was redundant and was deleted from the Agreed Order. Thus, the limitations on *ex parte* communications with parties' attorneys constituted the only constraint on the authority of the experts and the Manager to communicate with anyone.

4. The Panel's Investigation

The flexible, truth-seeking process that the parties had persuaded the court to create continued for several months with what Professor Morris described as an atmosphere of "close and uninhibited collaboration." Pet. App. III (K), Exh. 11, at 2. The experts met several times with counsel for the parties, and they had lengthy discussions outside the presence of plaintiffs' representatives with then DMH Director McDonald and his top aides. *See id.*, at 1 and Exh. 12, at 1. They also met on several occasions with Mark Heyrman of the University of Chicago Law School, a prominent authority on the mental health system in Illinois. *Id.*, Exh. 12, at 1. The experts were free to consult *ex parte* with anyone, except counsel for the parties in this lawsuit, who might assist in their inquiry. Pet. App. I (G), at 3.

Pursuant to the Agreed Order, Professor Morris regularly met with the court *ex parte* to discuss the status of the Panel's investigation. These meetings were disclosed to the parties in monthly reports, which also advised the

court and the parties on the progress of the panel's investigation. *E.g.*, Pet. App. III (K), Exhs. 16 and 17. Professor Morris and the experts regularly disclosed how they spent their time on the case through written time records. *See, e.g., id.*, Exh. 19. When the experts decided to broaden their inquiry to include a longitudinal examination of the experience of patients as they cycle in and out of Chicago area DMH institutions, the parties discussed this decision with them at length and the court approved it. *See id.*, Exhs. 11, 20.

5. The August 1994 Meeting With The Parties And September 7, 1994 Meeting With The Court

On August 10, 1994, the Panel briefed the parties on their "progress and tentative, general findings of their study so far." Pet. App. III (K), Exh. 16, at 1. Professor Morris advised the parties and the court that the panel intended to make a similar report to the court. *Id.*, at 2. That meeting between the Panel, the Manager, and the Court took place on September 7, 1994,[5] as reported to the parties in Professor Morris' monthly report for September. *Id.* Because Professor Morris had informed the parties that the substance of the September 7 meeting would be similar to that of the August 10 meeting, defendants' assertion that they learned of the subject matter "[o]nly in the two weeks immediately preceding defendants' recusal motion" (Pet. 17) is palpably false.

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[5] Defendants suggest that Professor Morris erred by attending the September 7, 1994 meeting between the experts and the court (Pet. 33-34), but the Agreed Order authorized him to "report to the Court and the parties." Pet. App. I (G), at 4.

The subject matter of the September 7 meeting was completely consistent with the terms of the Agreed Order, which authorized the court to instruct the panel on the scope of its investigation. Pet. App. I (G), at 4. The experts had completed much of their investigation and were ready to begin outlining the structure of their draft report. Before doing so, and recognizing that they were the *court's* experts under Rule 706, they thought it sound and appropriate to review their progress with the court and to "set a course of action for completing the preliminary draft." Pet. App. IV (J). Thus, they outlined their "methodological approach," their "standards, criteria, instruments, review team, and nature of the data," their "longitudinal and cross-sectional approaches," how their approach differed from others, and a general preview of their preliminary findings. Pet. App. IV (I). There is no evidence that the district court pre-approved or commented on the substance of the report during this meeting, only that it advised the Panel, in accordance with its obligations under the Agreed Order, that the Panel was obligated to use generally acceptable and appropriate methodologies. *See* Pet. App. IV (C), at 43-44, *quoted in* Pet. 18.[6]

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[6] The court's admonition to its experts that they must do their jobs and meet the requirements set forth in *Daubert* was sensible and prudent. There is no basis for recasting it, as defendants have done, into a forecast of how the court will eventually rule on the substance of the Panel's ensuing findings. Indeed, the court has regularly expressed during the course of this litigation that it has kept an open mind on these issues and that the Panel's report would be fully open to challenge at trial. *E.g.*, Pet. App. II (K), at 21-26; (E), at 35; Pet. App. I (W), at 9; (Q), at 15, 20-24; (I), at 18, 28, 57.

6. The Draft Report and Related Settlement Discussions

In January 1995, the Panel issued a draft report.[7] The report, which was a devastating indictment of the mental health system in Illinois, was shared with both parties in accordance with the Agreed Order. Pet. App. I (G), at 9. The parties then submitted written comments on the draft and had a lengthy meeting with counsel for both sides

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Defendants' discussion of the September 7 meeting exemplifies the factual distortions on which their motion is based. The outline for the meeting included an item about how the panel's methodological approach "differs" from other types of evaluators, including "JCAHO and Title XVIII." Pet. App. IV (I). There is no evidence to support defendants' contention that "[t]he panel thus sought to persuade Judge Duff of the superiority of their approach to that of the JCAHO studies expected to form an important part of defendants' case." (Pet. 17). Indeed, this contention is belied by the experts' report which explicitly combines "traditional" evaluation methodologies with other expanded approaches. Pet. App. I (J) at 9. Moreover, defendants had not suggested *any* defense to Plaintiff's claims – based on JCAHO or anything else – as of September 7, 1994, so there was no reason the Panel should have foreseen any need to convince anyone on this point.

[7] Defendants argue that Professor Morris "exceeded his narrow commission" by editing and helping to assemble the expert panel's report. Pet. 33. But the Agreed Order expressly authorized him to "coordinate and facilitate the investigation *and reports* of the Panel." Pet. App. I (G), at 4 (emphasis added). As Professor Morris himself put it, "I have done my best to play an administrative organizational role and an editorial role, but on the substantive issues I am ignorant and haven't commented other than editorially." Pet. App. II (K), at 15. It is not surprising that the Manager spent substantial time on the report since he helped with the editing and apparently did all the typing. Pet. 35, quoting App. II (K), at 15-16, 80.

and several senior DMH officials to discuss those comments. *See* Pet. App. III (K), Exh. 16. In addition, the parties met with the experts and court in chambers. A final report was completed and presented to the parties in June 1995 but, in the interest of promoting settlement, was not publicly released.

Subsequent to the issuance of the draft report, the court and the parties met repeatedly in an effort to find a basis for settlement. Unfortunately, defendants repeatedly sent representatives to settlement discussions who had no authority to negotiate a settlement of the case and who had no clear guidelines regarding defendants' settlement position. *See, e.g.*, Pet. App. I (K), at 11. On September 27, 1995, frustrated by the parties' lack of progress, the court ordered both sides to submit concept papers concerning settlement, descriptions of experts they expected to call at trial and indications of whether the parties planned attacks on the Panel's report and conclusion. Pet. App. I (K), at 13-17. This was followed by a lengthy telephone conference in which the concept papers were discussed among the Panel and counsel for the parties. *See, e.g., id.*, Exh. 18.

Finally, in December 1995, after months of *ex parte* and joint conversations among the parties, the Panel and the court, and after a petition by the Associated Press seeking to make the report public, the court concluded that settlement discussions were not promising and ordered the public release of the Panel's report.[8] *See* Pet. App. I (O), at 31-32.

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[8] One of the court's experts, Dr. Okin, wrote to the court praising the decision to release the experts' report and

7. Defendant's November 1995 Objection to the Expert Report

In November 1995, defendants filed an *in camera* objection to the admissibility of the experts' opinions at trial. Pet. App. I (L), Exh. 2. Defendants did not serve this document on plaintiffs.

The November 1995 objection is critical because it demonstrates how long defendants were aware of the *ex parte* meetings between the Panel and the court that are the centerpiece of their present Petition. In their November 1995 submission, the defendants complained specifically that the district court "has apparently met privately and had substantive discussions with the panelists." Pet. App. I (L), Exh. 2, at 1. They also complained of the Manager's role in meeting with the experts and the court and in working on the report. Pet. 35 n.19, citing Pet. App. I (L), Exh. 2, II (H). The *ex parte* contacts, the defendants asserted, were grounds for barring the experts' testimony. Pet. App. I (L), Exh. 2, at 2. Defendants repeated substantially the same accusation in a

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suggesting some strategies that might spur a settlement. Pet. App. IV (W). Dr. Okin repeatedly had been invited into the settlement process by the parties and, under the terms of the Agreed Order, was permitted to advise the court regarding defendants' settlement proposal. *See* Pet. App. I (G), at 2. The district court properly advised the parties that it had received a letter from one of the experts on which it did not rely, instead passing it on to Professor Morris with the message that the experts should not communicate in that fashion. Pet. App. II (K), at 77. Defendants also refer to a related letter by Ms. Knisley to unidentified consultants, Pet. 29, citing Pet. App. IV (Y), but there is no indication that this letter was ever sent to the court.

written status report filed with the district court on May 3, 1996. Pet. App. II (H), Exh. A. Thus, defendants' contention (Pet. 45) that they filed their recusal motion in June 1996 immediately after learning of such purported contacts is egregiously and inexcusably mistaken.

8. The Final Report

The Panel's report was publicly issued in December 1995. As a preliminary matter, the report explained the Panel's methodology. As the report explained, the Panel used a traditional approach that involved a review of each hospital's physical plant, policies and procedures, and patient charts, supplemented by "interviewing patients, patients' families, and staff, and by making visits to jails, ICF-MI's (Intermediate Care Facilities - Mentally Ill), shelters, boarding homes and community agencies." Pet. App. I (J), at 9. In addition, with the agreement of the parties, the Panel recruited a project manager and 12 clinical reviewers to follow a sample of more than 45 patients hospitalized or deflected (*id.* at 10), thereby implementing the authorization of the Agreed Order to visit and investigate community institutions and facilities. Pet. App. I (G), at 3.[9]

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[9] The authorization in the Agreed Order to visit and investigate community institutions and facilities was plainly known to the defendants' as was the expert's view, which was expressed to the court, that this was necessary to fulfill their charge. *See* Pet. App. III(K), Exh. S, at 1, discussed *supra*. Defendants have known literally for years that this would be an area of the experts' investigation. It is not a basis for recusal. But *see* Pet. 20.

The results of the study were poignant, dramatized by the Panel's finding that "a pervasive undercurrent of violence" plagued the state hospitals. Pet. App. I (J), at 28. The Panel found that numerous patients are admitted to state hospitals because of the absence of appropriate treatment options in community settings and that many more are deflected by hospital admissions officials without being linked with appropriate services, particularly in situations where mentally ill patients also had problems of substance abuse. *Id.* at 11-12. The report found clinical assessments in state psychiatric hospitals in Illinois to be "shallow, incomplete, lacking in specificity and devoid of the most basic information necessary to formulate and carry out an adequate treatment plan." *Id.* at 16. Treatment plans and staff- patient interactions were "sparse, superficial and often uncaring," *id.* at 12-23, and restraints were used excessively, contrary to minimum professional standards. *Id.* at 24. The result was "neglectful and substandard treatment for a large number of patients in state psychiatric hospitals in Illinois." Pet. App. I (J), at 22. The Panel's report also identified numerous instances of patients being ignored or neglected, a lack of sensitivity and resources to deal with linguistic and cultural differences, poor staff morale, inadequate quality assurance, and wholly inadequate discharge planning. *Id.* at 23-33.

9. Production of the Panel's Files

Though defendants persistently imply otherwise (*e.g.*, Pet. 10), the parties were continuously supplied with information provided to the court's experts in accordance with the Agreed Order. *See* Pet. App. I (G), at 5. All

materials (less than a box) provided to the Panel by plaintiffs were given to defendants, and approximately 20 boxes of materials given to the experts by defendants were provided to plaintiffs. Pet. App. II (W), at 38-46.

Beginning with the filing of the Panel's draft report in June 1995, the defendants unleashed a series of increasingly overbroad and burdensome requests for virtually every document the panel had ever seen. *See* Pet. App. II (A). The defendants wanted the experts' drafts, their calendars, phone messages and searches of memories of their computers. The court expressed legitimate concerns over the magnitude of this inquiry, and protected the Manager and the Panel from the burden of such productions while settlement discussions were in progress during the summer and fall of 1995. *E.g.*, Pet. App. II (K), at 24-26.

In December 1995, defendants filed a new motion for disclosure of additional expert materials. At this point, it was becoming clear that settlement discussions had broken down, and the court ordered disclosure. Pet. App. I (T), at 10. When defendants presented a written order, it was overbroad and raised judicial concerns about whistleblowers, and the court asked to consider the matter further. Pet. App. I (W), at 4-7. After additional arguments and briefing, the motion was heard on May 10, 1996, and the court ordered production of additional materials at that time.[10] Pet. App. II (K), at 26-45.

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[10] In ordering additional production of the Panel's files, the court colorfully emphasized its concerns about the overbreadth of defendants' request:

Whatever complaints defendants may have about the court's handling of those issues, one thing is clear: As the Manager confirmed at a hearing before the court on June 13, 1996, defendants now have all of the Panel's documents.[11] Pet. App. II (M), at 14-16.

10. Discovery And Trial Preparations

After discovery reopened in September 1995, plaintiffs' counsel engaged in conventional pre-trial investigation, speaking with mental health lawyers, consumers, and advocates in Illinois and around the country about facts, documents, and possible witnesses. Plaintiffs' counsel consistently followed the terms of the Agreed Order during this process and did not have any *ex parte* communications with the court's experts. *See* Pet. App. III (K), Exh. 14., at 1. Notwithstanding the unsupported assertions of defendants (Pet. 36), there is no evidence that the

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> What I'm saying to you is if you were bringing the lawsuit against Madame Curie, would you want to see every slide she ever looked at or every test tube she ever put over a bunsen burner? I doubt it. And if you did, in this instance where we are dealing with thousands of people and years of gathering of data, if you tried to be – make it a micro examination, you're going to get redundancy.

Pet. App. II (K), at 38.

[11] Defendants' claim (Pet. 12) that they were prevented from copying documents is completely baseless. Plaintiffs requested that only a few documents containing the names of whistleblowers not be photocopied. Pet. App. II (W), at 46.

Panel or Manager, individually or collectively, put plaintiffs' counsel in touch with anyone during the course of trial preparation.

Given the expansive nature of the Panel's court-mandated inquiry, it is not surprising that plaintiffs' counsel was in contact with many of the same people the Panel had contacted. For example, one of those with whom plaintiffs' counsel consulted was Mark Heyrman, a legal expert on mental health issues at the University of Chicago Law School.[12] Mr. Heyrman called one of plaintiffs' attorneys, Benjamin Wolf, to convey information about possible witnesses at DMH and elsewhere. Contrary to defendants' contentions (Pet. 36), the undisputed evidence demonstrates that Mr. Wolf did not suggest that Mr. Heyrman also convey that information to the experts (although Mr. Wolf could have done so under the terms of the Agreed Order), and he was totally unaware that Mr. Heyrman did so. Pet. App. III (K), Exh. 14, at 1-2, and Exh. 15, at 2. *See also* Pet. App. III (K), Exh. 8, at 10 (defendants agree that plaintiffs have the right to refer sources of information to panel).

Although the parties and Manager had agreed, in response to defendants' objection that Mr. Heyrman had represented parties in different suits against DMH, that

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[12] The notion that Mr. Heyrman was a lawyer or consultant for plaintiff (Pet. 32) is another example of defendants' continuing mischaracterization of the record. Mr. Heyrman's affidavit demonstrates both that he was not working for plaintiffs and that he was in frequent contact with defendants. Pet. App. III (K), Exh. 15. Plaintiffs were unaware of these conversations, and there is no reason they should have known of them.

Mr. Heyrman would no longer be used as a paid consultant to the Panel (as he had been in 1994), there was no agreement that Mr. Heyrman would be singled out and prohibited from having *ex parte* contacts with the court's experts. Pet. App. III (K), Exh. 14, at 2, and Exh. 15, at 3. Indeed, that would have required a modification of the Agreed Order which permitted the Panel to communicate with anyone they thought appropriate. Pet. App. I (G), at 7. Moreover, plaintiffs had previously directed the experts to lawyers who had sued the State in other cases with no objection from defendants. *See, e.g.*, Pet. App. III (K), Exh. 13.[13]

As part of preparation for trial, Mr. Wolf also contacted the Bazelon Center in Washington, D.C., a leading legal and policy organization on issues of mental health. Claudia Schlossberg, a Bazelon Center attorney, sent Mr. Wolf some information about the process for accrediting mental health facilities and also about one of defendants' experts, Dr. Gualtieri. *See* Pet. App. (III), Exh. 14, at 2. Apparently, Ira Burnim, the Legal Director of the Bazelon Center, subsequently shared some of the same information with one of the court's experts. Pet. App. IV (II) and (JJ). Mr. Wolf was completely unaware that Mr. Burnim did this (although, pursuant to the Agreed Order, Mr. Wolf properly could have suggested that Mr. Burnim

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[13] Defendants contend (Pet. 39-40) that Mr. Heyrman's association with a public hearing organized by Mental Health Association of Illinois ("MHAI") is evidence of the conspiracy against them. Indeed, they deride the "public" character of that hearing. Pet. 39. Yet, this was but one of several hearings conducted by MHAI during this period, in two of which top DMH officials, including defendant Director Patla, participated.

share his information with the court's experts). *See* Pet. App. III (K), Exh. 21, at 4, and Exh. 14, at 2.

11. Defendants' Recusal Motion And The District Court's Opinion

In June 1996, just weeks before the scheduled trial of this case, defendants filed a motion to recuse the district court judge, stay all proceedings, and continue the trial. Pet. App. II (P). Defendants accused the court of judicial bias and partiality, contending that it had orchestrated "a strategic alliance" consisting of "plaintiffs' counsel, expert witnesses and advocacy groups." *Id.* at 1. After plaintiffs responded, the district court denied defendants' motion on July 2. *See* Memorandum Opinion, July 2, 1996 ("Mem. Op."), attached to Petition.

In its opinion, which defendants conveniently ignore throughout their Petition, the district court carefully discussed the procedural and factual deficiencies in plaintiff's recusal motion. First, the court considered defendants' motion for recusal under 28 U.S.C. § 144. After explaining that the motion initially filed by defendants was procedurally inadequate because of its failure to include an affidavit signed by a party and an attorney certificate of good faith, and untimely because of defendants' long delay in the face of a pressing trial date,[14] the court nonetheless considered the late filed affidavit of

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[14] The court noted the *in camera* memorandum that defendants had filed in November 1995, which stated that the court had held "substantive" discussions with the panelists, both directly and through their manager, Professor Morris. Mem. Op. at 4 n.5, citing Pet. App. I (L), Exh. 2. *See supra.*

DMH Director Patla on the merits and carefully explained its decision to reject her conclusory charges of actual bias. Mem. Op. at 5-12.

Initially, the district court noted that defendant Patla's references and rhetoric concerning the Panel's communications with Mr. Heyrman and Mr. Burnim could not convince a reasonable person that the court was biased. *Id.* at 6. As the court explained, there was no suggestion that the court was aware of any of these communications, and experts' contacts with other individuals in related fields could not affect the court's ability to preside over the case at bar or convince a reasonable person that bias exists. *Id.*

Turning next to its September 7, 1994 meeting with the Panel, the court explained that there was nothing in defendant Patla's affidavit that supported an allegation of bias. Even assuming that various topics mentioned in Dr. Okin's outline and later covered in the Panel's report were actually discussed, such preliminary discussions of the experts' methodology and conclusions were "part of the Court's judicial function" while the case "was still in a settlement posture." *Id.* at 7-8. The court pointed out that such "minimal contact with the experts" was consistent with the Agreed Order, and that defendants had provided no evidence or indication that the court had prematurely accepted the panel's methodological approaches. *Id.* at 7. The court also found that no reasonable person could think it biased simply because Dr. Okin had asked for a meeting or sent the court a letter, especially because nothing indicated that any such requests

were successful or that they had influenced the court's views as to the substance of the experts' report. *Id.* at 8.[15]

In response to defendants' complaints about some of its rulings and comments from the bench, the district court noted that such "judicial rulings alone almost never constitute proper grounds for recusal." *Id.* at 8, 18 quoting *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994). The court explained that most of the challenged statements simply pressed for settlement as an alternative to a lengthy trial, hardly an indication of bias or prejudice. *Id.* at 9. And, as for defendants' accusation that it had

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[15] Of course, there is even less reason to credit defendants' argument (Pet. 21-22, 29) that two November 1995 memoranda from Dr. Okin (one to Professor Morris and the other to Ms. Knisley and Professor Morris) and two December 1995 letters from Dr. Okin and Ms. Knisley to third-party consultants are somehow relevant to whether the *court* is biased against them. Far from showing that the court ever saw or knew of those communications, defendants are reduced to a weak assertion (Pet. 22) that "Judge Duff has never denied receiving" a copy of the first memorandum.

Defendants further contend that the court's July 1995 response to a letter from a mental health advocacy group evidences his bias in favor of plaintiffs. Yet, in that response, the court (i) *refused* the group's request that it immediately release the expert panel's report, (ii) *complimented* the great "thoroughness and concern" shown by the parties, including "the defendants' attorneys," and (iii) told the association that it had "no role, responsibility or rights in this litigation." Pet. App. IV (R). In short, the court told the group not to bother it and to let the proper parties proceed with the case. Shortly after receiving the letter, the court summarized its contents and the court's response at an in-chambers status hearing. Pet. App. III (E), at 8-10.

accepted the expert's opinions as facts, the court demonstrated that defendants "choose selectively" from trial transcripts and that a more contextual reading showed that the "Court remained open-minded." *Id.* at 10-11.

Finally, the district court emphasized that no bias was apparent from its initial refusal to give the parties access to all materials and information considered or received by the Panel. The court pointed out that it initially denied access because discovery was still closed, and that in any event it was appropriate to deny defendants' voluminous requests until the court had an opportunity to review the Agreed Order to weigh the proper scope of such discovery. *Id.* at 11-12. Although the court was skeptical at first about whether defendants had a right to documents pertaining to *ex parte* communications between the Panel and the court, it established a briefing schedule on the question, showing that it was open to being convinced by either party's legal arguments. *Id.* at 12. Ultimately, the court authorized disclosure of at least 23 boxes of documents from the Panel, though, consistent with the Agreed Order, a few documents identifying whistleblowers were to be reviewed only by counsel at the Manager's office. *See* Pet. App. II (W), at 44-46.

The court exhibited similar care in analyzing defendants' motion for recusal under 28 U.S.C. § 455. The court carefully reviewed the Patla affidavit and the voluminous additional materials submitted by defendants. The opinion noted, however, that the court was not bound under section 455 to take defendants' factual averments as true and corrected some of their misstatements and misrepresentations. Mem. Op. at 13-14.

First, the court considered the claim that its failure to rule on defendants' motion for partial judgment on the pleadings (which defendant waited over three years to file) showed a bias or prejudice against defendants.[16] The court explained that this motion was not fully briefed until March 1996 and was closely intertwined with a related motion by plaintiffs for leave to amend which was not fully briefed until May 14, 1996. *Id.* at 14. The court initially thought the motion for partial judgment on the pleadings had become moot until defendants explained in late May that the motion was equally applicable to the tendered amendment. *Id.* The court was near ready to rule in June but had been requested by defendants to avoid ruling while the recusal motion was pending. *Id.* at 15 n.7.

The district court also responded to defendants' allegations that the court was influenced by Dr. Okin's December 7, 1995 letter to campaign "behind-the-scenes" to pressure the Governor into settling this case. The Memorandum Opinion cited the record to show that the court had suggested involving the Governor in settlement discussions long before Dr. Okin sent his letter. *Id.* at 15 (citing Pet. App. I (I), at 57; (K), at 9). Moreover, the court pointed out that after reading a legal memorandum from

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[16] In this motion, like their Petition (at 9), defendants mischaracterize plaintiffs' claim as asserting some sort of constitutional right to social services for everyone in the State. In fact, plaintiffs simply seek constitutionally adequate care for the plaintiff class. The precise nature of defendants' responsibilities and an appropriate remedy should be decided after a trial on the merits and is not presently before this Court. *See* Pet. App. I (Y).

defendants, it had recognized that its prior belief that it could compel the Governor to participate in settlement discussions was a "possible error," and the court therefore "refused to pursue the issue further." *Id.* at 15-16. In any event, the court noted, "a judge may attempt to facilitate settlement at any stage of litigation," and its efforts to do so could not be evidence of partiality or bias. *Id.* at 16.[17] The district court specifically rejected defendants' charges of veiled threats, correctly recalling the context of its remarks and the responses of counsel as the court attempted to cajole the defense into productive settlement discussions. *Id.* at 9-10 and n.6.[18]

Turning to 28 U.S.C. § 455(a), the court reviewed each of the cases cited by defendants and contrasted the extremely biased public statements concerning the merits that were ata [sic] issue in those cases to the notable absence of any statements in this case that create even an

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[17] Defendants' unsubstantiated assertion – in their statement of facts – that "Judge Duff has permitted Dr. Okin to influence him into pressuring defendants with all means at his disposal" (Pet. 28) – typifies the extraordinary lengths to which they go to conjure up a conspiracy here.

[18] In another example of their efforts to torture and lift the court's remarks out of context, defendants note that the court "expressed his view that if defendants did not succeed in their recusal motion, they were in 'deep do'." Pet. 13, *quoting* Pet. App. II(W) at 86. Clearly, the defendants attempt to create an impression of a threat by the court. In fact, the court merely emphasized that the pendency of defendants' recusal motion should not be viewed as an excuse to stop trial preparation, since the court planned to adhere to the trial date and still expected the parties to complete discovery and preparation of the pretrial order. Pet. App. II (W), at 86.

arguable appearance of impropriety. The court recognized that on occasion it had "expressed dissatisfaction with the defendants" but emphasized that "it was the result of [its] perception that the defendants were dilatory in the discovery process or attempting to delay the trial." *Id.* at 22. It noted that "[a]t times, in order to manage this case, this Court has had to reprimand *both* parties." *Id.* (emphasis added). "None of these comments indicated any deep seated favoritism or antagonism and none result from any extrajudicial source." *Id.*

The district court concluded by acknowledging that the seriousness of defendants' contentions required careful consideration, despite the glaring procedural failures of defendants' motion. Having done so, the court found "no justifiable reason" why it should recuse itself based on defendants' "incomplete statements which are taken out of context and improper characterizations." *Id.* at 22-23.

12. Proceedings Subsequent To Defendants' Recusal Motion

Defendants argue that between June 13 and July 2 the district court engaged in a "cover-up" and "attempted to put the lid back on" after evidence of wrongdoing "leaked out." Pet. 44, 46. In fact, the court acted reasonably in response to defendants' frantic effort to prevent this case from proceeding to trial on the merits.

A review of the transcripts from hearings during this period demonstrates that the court provided perfectly legitimate reasons for limiting further discovery on the motion for recusal. First, the court sought to protect the

trial date, noting repeatedly that its calendar was extremely full and that complying with all defendants' requests would interminably delay the trial if the motion were denied. *E.g.*, Pet. App. III (N), at 5 (the court explaining that much of the paper filed by defendants to supplement its recusal motion was "unnecessary" and "will automatically cause a delay in the trial whether we like it or not"); *id.* (E), at 21. Second, the court sought to deter defendants from making multiple filings minutes before scheduled hearings and thereby prevent the court and plaintiffs from preparing properly. *E.g.*, Pet. App. III (C), at 68 (defendants' belated filings "made it extraordinarily difficult for the Court to even be familiar with the issue"). Third, the court wanted to ensure that plaintiffs could respond to defendants' motion as filed, rather than at a target constantly changing due to defendants' filings of hundreds of pages in supplemental appendices *after* they had filed their recusal motion. *E.g.*, Pet. App. III (E), at 83 (the court stating that plaintiffs "shouldn't have to try to shoot at a moving target"); Pet. App. II (W), at 58 (the court noting that plaintiffs need "a chance to review the material"). Fourth, the court sought to ensure that defendants complied with the procedural requirements of 28 U.S.C. § 144, one of the statutory bases for defendants' motion, which requires a "timely and sufficient affidavit . . . accompanied by a certificate of counsel of record." *E.g.*, Pet. App. II (W), at 73-74 (the court doubting the timeliness and sufficiency of § 144 affidavit). Finally, the court recognized that it has both the authority and the duty to manage the course of litigation before it.

Defendants' allegation of a cover-up is part and parcel of its imaginative theory of a "strategic alliance"

encompassing the court, plaintiffs' counsel, the court's expert witnesses, noted scholars, and mental health advocacy groups. *E.g.*, Pet. 1. It is also consistent with defendants' efforts – spurred by the findings in the Panel's report – to derail trial of this case and undermine the legitimacy of the experts and, now, the court itself. But defendants' charges are completely *inconsistent* with the record of this proceeding. In the end, defendants were given discovery of the Panel's documents and leave to file everything they wished, except for their belated Third Supplemental Appendix and their unnecessary reply brief.

13. The Continuing Harm to the Plaintiff Class

During the year since the issuance of the Report of the Court Appointed Expert Panel, defendants have made every possible effort to avoid discovery and trial. Plaintiffs expect to prove at trial that the Illinois mental health system continues to be woefully inadequate and in violation of the fundamental constitutional rights of plaintiffs. The findings in the Panel's Report are consistent with numerous reports by organizations such as the Illinois Psychiatric Society and the U.S. Department of Justice as well as studies by defendants' own employees. Plaintiffs have filed contemporaneously with this Brief an Emergency Motion for leave to supplement the record with a sample of these studies and reports. *See, e.g.*, Letter from Illinois Psychiatric Society to Robert Okin (one of the court-appointed experts) dated September 9, 1994, at 2 ("It has been our observation that the IDMHDD requires outside intervention to make meaningful and substantial

improvement in patient care. . . . it has been our observation that the IDMHDD maintains psychiatrist to recipient staffing ratios that do not allow for the delivery of adequate psychiatric care. . . . "); June 22, 1995 Memorandum to defendant Patla from Leigh Steiner, Ph.D. and to Tom Simpatico, M.D., at 5 ("The medical administration at Chicago-Read acknowledges the dysfunctionality of the therapeutic culture at the hospital"); Consultation Report on Treatment Efforts at Chicago-Read Mental Health Center dated January 28-30, 1992, by Richard Hunter, Ph.D. (Quoting staff: "This place is a fraud factory. . . . Treatment recorded in the records is a fantasy"); Mental Health Block Grant Plan for FY 94, at 3-4 (acknowledging that in Illinois there are "too many persons with mental illness receiving no services" and "too many persons with mental illness receiving inadequate and/or inappropriate services . . . "); Memorandum from Richard Hunter, Ph.D to Director McDonald dated May 11, 1992, at 1 ("Staff to patient ratios in Illinois DMHDD facilities are among the lowest in the nation. Low staffing levels lead to inadequate treatment, place staff and patients at increased risk or injury, and place our facilities in jeopardy of losing certification and accreditation"); Survey of Chicago-Read Hospital prepared for the Department of Justice by Eric Lister, M.D. dated November, 1992, at P735 (criticizing the poor quality of clinical programs, treatment teams and treatment plans).

These reports demonstrate that the Illinois mental health system continues to suffer from systemic deficiencies and inadequacies in the care of patients confined to its hospitals. The instant recusal motion is merely the latest effort by defendants to avoid a public trial and

justice for the plaintiff class of mentally impaired individuals in this state.

ISSUES PRESENTED

The defendants' statement of the issues presented assumes favorable findings on all critical factual issues and therefore ignore the issues actually before the Court. For this reason, plaintiffs present the following issues:

1. Whether a motion for recusal under 28 U.S.C. § 144 is properly reviewable by this Court on mandamus?

2. Whether the Court should deny defendants' Petition as untimely because defendants delayed filing their motion to recuse until long after they were aware of the events on which they rely to support recusal?

3. Whether there is compelling evidence of extrajudicial influence from which the impartiality of the district court might reasonably be questioned that requires this Court to exercise its mandamus jurisdiction and recuse the district judge pursuant to 28 U.S.C. § 455(a)?

4. Whether there is compelling evidence that the district court has personal knowledge from an extrajudicial source of disputed evidentiary facts concerning the case below that requires this Court to exercise its mandamus jurisdiction and recuse the district judge pursuant to 28 U.S.C. § 455(b)(1)?

5. Whether there is compelling evidence that the district court has extrajudicial bias or prejudice against defendants or in favor of

plaintiffs that requires this Court to exercise its mandamus jurisdiction and recuse the district court pursuant to 28 U.S.C. § 455(b)(1) or, if it is applicable on mandamus and under the circumstances of this case, 28 U.S.C. § 144?

ARGUMENT

THERE IS NO COMPELLING EVIDENCE OF BIAS BY THE DISTRICT COURT TO JUSTIFY THE EXTRAORDINARY RELIEF OF A WRIT OF MANDAMUS.

As defendants recognize (Pet. 1), mandamus and recusal are extraordinary remedies. They are not designed to facilitate forum shopping or trial delays. Rather, they are remedies for impermissible judicial bias established by compelling evidence. *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). Except in the most extraordinary circumstances, such evidence must stem from an extrajudicial source. *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994).

No such evidence exists in this case. Most of the voluminous materials submitted in support of defendants' Petition involve conduct and communications of the Panel, the Manager and third parties that have no connection or relationship to the district court. These materials make it clear that defendants dislike the Panel's report and some of the district court's rulings. But they provide no evidence from which the district court's impartiality may reasonably be questioned, 28 U.S.C. § 455(a), no evidence that the district court "has a personal bias or prejudice concerning a party," 28 U.S.C §§ 144, 455(b)(1), and no evidence that the district court

has "personal knowledge of disputed evidentiary facts concerning the proceeding," 28 U.S.C. §§ 144, 455(b)(1). In short, as the court explained in its carefully reasoned opinion, "the defendants . . . present no justifiable reason why [the district court] should disqualify itself." Mem. Op., at 23.

The complete lack of evidence in support of defendants' charges of judicial bias is compounded by the tardiness and procedural deficiencies in their motion for recusal. Defendants' mandamus petition does not challenge the district court's findings that their motion for recusal failed to satisfy the statutory requirements of section 144. More importantly, defendants' motion for recusal was properly rejected because of their unwarranted delay in filing it. The defendants' failure to seek recusal in a timely fashion after they had knowledge of alleged improprieties in the conduct of the court suggests the true nature of their recusal motion and petition for mandamus: They are a transparent effort to avoid an impending trial that will include adverse findings and opinions of a court-appointed panel of experts that defendants joined in selecting.

A. The District Court's Denial Of Defendants' Section 144 Motion Is Not Properly Before This Court.

This Court has long and consistently held that a writ of mandamus is not "available for review of a trial judge's ruling on a motion for disqualification for bias or prejudice under 28 U.S.C. § 144." *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977); *accord Action*

Realty Co. v. Will, 427 F.2d 843, 845 (7th Cir. 1970); *Korer v. Hoffman*, 212 F.2d 211 (7th Cir. 1959).

Even if mandamus were an appropriate vehicle for reviewing the denial of a section 144 motion for disqualification, the instant petition must be denied because defendants have not challenged the district court's finding that they failed to submit the "timely and sufficient" affidavit and certificate required by section 144. A motion under section 144 must be accompanied by a "timely and sufficient affidavit" from "a party" showing "personal bias or prejudice either against [the party] or in favor of any adverse party," and a certificate by counsel stating that the motion was made in good faith. 28 U.S.C. § 144. The district court correctly held that the affidavit filed by defendants with their motion for recusal was not from a party but from one of their attorneys; in addition, defendants' recusal motion lacked the required certificate of good faith. Mem. Op. at 3; *see* Pet. App. II (O). The defendants later attempted to cure these obvious deficiencies by filing an affidavit from defendant Patla and a certificate of counsel. Mem. Op. at 3-4. However, this Court has held that a deficient section 144 motion cannot be cured by such subsequent filings.[19] *Balistrieri*, 779 F.2d at 1200 ("a party may file only one affidavit in a [§ 144] case"), cited in Mem. Op. 3-4.

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[19] Although the district court granted defendants leave to file the Patla affidavit *nunc pro tunc*, Pet. App. III (F), in Pet. 54 n. 24, there was no suggestion that it did so back to the date that defendants filed their motion for recusal rather than the date leave was sought to file the affidavit and certification. *See* Mem. Op. at 5, 13.

Defendants' Petition does not challenge the district court's findings on these technical deficiencies in their section 144 motion. Thus, they have waived any argument that they satisfied the requirements for a section 144 recusal, and the issue is not properly before this Court.

B. Defendants' Motion For Recusal Was Untimely.

Whether it is filed under section 144 or section 455, a recusal motion must be "filed at the earliest moment after the movant acquires knowledge of the facts demonstrating the basis for such disqualification." *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) (§ 144 motion), citing *United States v. Barnes*, 909 F.2d 1059, 1071 (7th Cir. 1990), and *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710 (7th Cir. 1986). The reason for this rule is obvious: delay in such motions would impose "heavy costs on other litigants and the judicial system," *In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1232 (7th Cir. 1988), and promote unacceptable tactical gamesmanship. *E.g., In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1358-60 (8th Cir. 1996).

Defendants' recusal motion is clearly untimely. Defendants long knew of the September 7, 1994 meeting that is at the heart of their Petition. After the experts briefed the parties on their progress and their tentative findings in August 1994, Professor Morris advised the parties in writing that the Panel would conduct a similar briefing for the district court. *See* Pet. App. III (K), Exh.

16. After the experts met with the court, Professor Morris advised the parties in his monthly report that the meeting had taken place. *See* Pet. App. III (K), Exh. 17.

Defendants waited more than a year – until after the experts had finished their report – to voice any complaint about this September 1994 meeting or *ex parte* meetings of the Panel and the Manager with the district court. Even then defendants did not seek recusal. Instead, in November 1995, defendants filed *in camera* a statement complaining that:

> [t]he Court has apparently met privately and had substantive discussions with the panelists both directly and through their Manager, Professor Morris. The panelists have also played an active and confidential role in exploring settlement options with the parties in meetings proposed and conducted by the Manager.

Pet. App. I (L), Exh. 2, at 1.

Rather than seek recusal either in the fall of 1994, when they learned of the *ex parte* meetings of the Manager and the Panel with the court, or in the fall of 1995 when they objected to them, defendants apparently chose to gamble. It is just this sort of opportunistic behavior that the timeliness requirement is meant to prevent:

> The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming.

Franks v. Nimmo, 796 F.2d 1230, 1234 (10th Cir. 1986) (citing *Smith v. Dany*, 585 F.2d 83, 86 (3d Cir. 1978)). *See*

also In re Int'l Business Machines Corp., 45 F.3d 641, 643 (2d Cir. 1995) ("[a] prompt application avoids the risk that a party is holding back a recusal application as a fall back position in the event of adverse rulings on pending matters."); 7 James W. Moore et al., *Moore's Federal Practice* ¶ 63.07[3] n. 7 ("The purpose of the timeliness requirement is to prevent the use of the statute as a dilatory litigation tactic").

Defendants seek to avoid the consequences of their delay by arguing that newly revealed documents now make clear for the first time that the September 7 meeting was to discuss the experts' expected testimony. *E.g.*, Pet. 45. Defendants assert in conclusory fashion that the "purpose and contents" of this meeting were not revealed until the experts produced a document apparently outlining the experts' agenda for the conference. Pet. 16. But that position is contrary to defendants' own statements to the district court. Defendants thought they knew enough last November to assert that the Court had held "substantive discussions with the panelists, both directly and through their Manager, Professor Morris." Pet. App. I (L), Exh. 2, at 1-2.

Defendants' "newly discovered evidence" adds nothing new to their position. The outline on which defendants rely demonstrates not that the Court "pre-approved" (Pet. 1) the experts' "potential testimony" (Pet. 17), but simply, as Professor Morris had advised the parties, that the experts presented a description of their methodology, preliminary conclusions, and the possible structure of their report. *See* Pet. App. III (K), Exh. 16, at 2.

Because they failed to seek recusal "at the earliest moment," defendants have waived any right to seek recusal. *Sykes*, 7 F.3d at 1339. *See also In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1360 (8th Cir. 1996) (writ of mandamus seeking recusal that was untimely and interposed for suspect tactical and strategic reasons should be denied for these reasons alone).

C. Defendants Have Put Forth No Evidence From Which The District Court's Impartiality Might Reasonably Be Questioned.

Notwithstanding the expansive recitation of irrelevant materials in their statement of facts, defendants' Petition offers, in essence, one basis for recusal under section 455(a). They argue that the district court "has conducted a pre-screening of expert testimony in private" and "has taken an active role in pre-approving the expert panelists' pro-plaintiff testimony, ensuring their methodology would withstand challenge." Pet. 52. In addition, in other sections of their Petition, defendants rely on in-court comments by the district court (*e.g.*, Pet. 24) and its participation in a settlement process designed with the parties' consent (*e.g.*, Pet. 26). None of these arguments supports recusal.

1. Judicial Comments and Rulings are not an Appropriate Basis for Recusal.

Section 455(a) requires a timely showing that a judge's impartiality might reasonably be questioned. *Balistrieri*, 779 F.2d at 1202. It supports recusal only if there is compelling evidence that "an objective, disinterested

observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Union Carbide*, 782 F.2d at 715. The general rule under sections 144 and 455 is that bias may constitute grounds for recusal only if it derives from an extrajudicial source. *Liteky v. United States*, 114 S. Ct. 1147, 1157 (1994) (holding that extrajudicial source doctrine applies to all the statutory recusal provisions based on bias or appearance of bias). Thus, recusal is unwarranted where the district court's views on the matter before it derive from the evidence or from conduct of the parties in the course of proceedings. *United States v. Grinnell Corp.*, 384 U.S. 563, 580-83 (1966).

Because of the requirement of extrajudicial bias, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 114 S. Ct. at 1157. As the Supreme Court recently explained, judicial remarks that are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* at 1157.

These well established legal principles clearly dispose of defendants' endless complaints about the timing of the district court's decisions, its management of the expert panel, and its rulings on pending motions, discovery issues and other issues. *E.g.*, Pet. 43. The defendants may not agree with the timing of the court's decision to release the Experts' Report, but the Agreed Order Appointing Experts always contemplated public release of the Report, Pet. App. I (G), at 9, and the court released it only after a breakdown in settlement negotiations made it clear that it was time to move forward with discovery.

Similarly, defendants may disagree with the timing of the court's decision on its motion for partial judgment on the pleadings, but that motion, which defendants waited three years to file, has only recently been fully briefed.[20] Mem. Op. at 14.

These kinds of "ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration" – are immune from attack under the recusal statutes and cannot support the instant petition. *Liteky*, 114 S. Ct. at 1157. *See Little Rock Sch. Dist.*, 839 F.2d at 1302 (rejecting recusal in part because in "complex and protracted" institutional litigation, "any human being," including a judge, is bound to "commit[] a procedural error or depart[] from protocol in some way"). As the Supreme Court explained in *Liteky*, these kinds of rulings may provide proper grounds for appeal, but not for recusal. 114 S. Ct. at 1157.

2. Settlement Discussions Are Not Extrajudicial.

Many of defendants' allegations concern communications involving settlement discussions. Communications

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[20] As discussed *supra*, defendants make much of the fact that the court has not ruled on their motion for partial judgment on the pleadings, briefing of which was completed in March 1996. Pet. 9-10. But, as the district court explained, that motion is necessarily intertwined with plaintiffs' motion to amend the complaint, which was not fully briefed until May 14, 1996. Though the court has indicated it is near ready to rule, Pet. App. II (W), at 13-16, defendants themselves requested that the court refrain from ruling on these motions pending resolution of the recusal issue. *Id. See* Mem. Op. 14-16.

about settlement, however, involve routine judicial activity and, like judicial rulings, are not a proper basis for recusal. *See Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989) (that judge expressed opinions while "exploring whether settlement was possible" was not grounds for recusal); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1252 (6th Cir. 1989) (judge's statements made at settlement conference about how he intended to rule were not extrajudicial and did not support recusal); *Franks*, 796 F.2d at 1235 (judge's "attempts to encourage a settlement [did] not give rise to an objective appearance of bias within the meaning of section 455(a)"); *Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980) (judge's statements during settlement negotiations, "even if intemperate," were not extrajudicial grounds for recusal) *cert. denied*, 450 U.S. 999 (1981); *Bradley v. Milliken*, 620 F.2d 1143, 1157 (6th Cir.) (*ex parte* settlement negotiations by judge, "[a]lthough perhaps a bit unorthodox," were "judicial activities" and not grounds for recusal under § 455(a)), *cert. denied*, 449 U.S. 870 (1980).

In this case, a central purpose of the expert panel was to promote settlement, and the court admirably devoted tremendous time and effort to facilitating that process. As this Court has recognized, it is settled law that a district court may participate in settlement negotiations so long as it does not "coerce settlement." *G. Heileman Brewing Co, Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 653 (7th Cir. 1989) (en banc). *Ex parte* communications with the parties' consent during settlement discussions are routine, and courts frequently express preliminary reactions to the case in that context. *See, e.g., Franks*, 796 F.2d at 1235; *Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1061-62 (N.D. Ga. 1990);

Billelo v. Abbott Labs., 825 F. Supp. 475, 479-81 (E.D.N.Y. 1993). If any "suspicion of partiality, though tenuous and remote in origin" during settlement talks warrants recusal, that result "would effectively end the participation of judges in settlement discussions." *Smith*, 752 F. Supp. at 1061-62.

The district court's participation in discussions of settlement options in this case – with the parties and with its own experts – was entirely proper. The Agreed Order on Experts expressly permitted the court to consult with the experts on settlement negotiations. Pet. App. I (G), at 2. The experts were involved in discussing settlement issues because the parties asked them to do so. They invited the experts to speak with DMH officials *ex parte* about their ideas and agreed that they would participate in a lengthy conference call with counsel. *See* Pet. App. III (I), Exh. 18. The parties consented to the court's *ex parte* communications with the experts, the Manager, and counsel in connection with that process. *See* Pet. App. I (G), at 4. They knew that such communications took place and did not object. *See* Pet. App. I (L), Exh. 2. *See Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp. 1231, 1243 (D.N.M. 1990) (plaintiffs waived claim for recusal under Section 455(a) by initially consenting to court's *ex parte* consultation with court's appointed experts).

Defendants attempt to create an illusion of extrajudicial bias by arguing that the court was tainted by receipt of a letter from one of its experts, Dr. Okin, that discussed strategies for creating a climate for settlement. Pet. 22-24. Yet, before the parties were aware of this letter, the court, on its own initiative, disclosed that it had received a letter from an expert, ignored its recommendations, and

instructed Professor Morris to tell the expert not to communicate in this fashion. Pet. App. II (K), at 77. Given the court's conduct and statements, there is no reason to believe that any of Dr. Okin's proposed strategies concerning contacts with the press – none of which were followed – had any effect.

In a vain effort to establish judicial influence by Dr. Okin's letter, defendants suggest the court adopted Dr. Okin's recommendation to bring the Governor and key legislators into settlement discussions. Pet. 25. The record of this case completely discredits this argument. Defendants are well aware that the court had made similar comments on the record and in chambers about involving the Governor and the General Assembly in settlement discussions long before receiving Dr. Okin's letter. *See, e.g.*, Pet. App. I (I), at 57-58; Pet. App. I (K), at 9-11; Pet. App. I (M), at 15. Indeed, from the first status hearings in this case, the district court often suggested the possibility of involving the Governor and top legislators in the settlement process. *See* Pet. App. III (K), Exh. 14, at 2-3. Defendants' contention that an experienced district court judge relied on the suggestions of a psychiatric expert for how to handle settlement negotiations with political officials is unpersuasive on its face. In any event, the fact that defendants' legal argument persuaded the court to change its view that it could compel the Governor to participate in settlement negotiations (Mem. Op. 15-16) is persuasive evidence that the district court's handling of settlement issues has been fair and impartial.

3. The Ex Parte Contacts Between the District Court and the Panel Were with the Parties' Consent and Cannot Be the Basis for a Motion for Recusal.

In their Petition, defendants complain repeatedly about *ex parte* contacts between the court and the expert panel. However vociferous, these complaints are difficult to take seriously. From their earliest discussions of the possibility of an expert panel, the parties explicitly agreed in proposed orders that the court could meet *ex parte* with the experts. Pet. App. III (K), Exhs. 8 and 9. The parties were well aware that the experts met *ex parte* with the court in connection with their report. *See* Pet. App. I (L), Exh. 2. There is no evidence that defendants objected to these conversations.

In their Petition, defendants express special outrage about a September 7, 1994 meeting in which the experts discussed plans for the report with the district court. This too is remarkably disingenuous. The experts first reported their tentative views to the parties in August 1994. Pet. App. III (K), Exh. 16, at 1. Professor Morris told the parties that the experts expected to make a similar presentation to the court. *Id.*, at 2. No one complained. No one suggested they wanted a report on the substance of the Panel's *ex parte* presentation to the court. Even when the defendants focused on this discussion months ago in November 1995 as a method of attacking the

expert report, they did not raise this issue as a basis for seeking recusal. Pet. App. I (N).[21]

Putting aside this factual background, the *ex parte* contacts between the district court and its expert panel are not a basis for recusal because they obviously took place in a judicial context. *Jackson*, 757 F. Supp. at 1241 (substantive telephone conversations between judge and his court-appointed expert did not arise in an extrajudicial context); *Bradley*, 620 F.2d at 1157 (*ex parte* meetings with court's experts and others were judicial activities and not grounds for recusal).

We recognize that some commentators have frowned on *ex parte* communications with experts appointed pursuant to Fed. R. Evid. 706, at least where these communications take place without the parties' consent. *See* Cecil & Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706* 40 (Federal Judicial Center 1993). But those same commentators have recognized that it is a prevalent practice. *Id.* at 41 ("More than half of the judges who responded to the question 'Did you communicate directly with the expert

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[21] In another illustration of the lengths to which they will go to stretch the truth, defendants try to create the impression that they were unaware of the court's invitation to talk with Dr. Okin and the Manager at the end of a hearing on September 27, 1995. Pet. 21 n.9, quoting Pet. App. I (K) at 30. The fact is that everyone was still in the courtroom, and the invitation was appropriately reported by the court reporter. *See id.* This is simply another example of the parties being well aware of *ex parte* communications between the court, the Panel and the Manager. Defendants did not object to such meetings or ask for any subsequent disclosures about their contents.

outside of the presence of the parties?' answered in the affirmative"). In this case, such commentary is truly academic because the parties had *agreed* on the experts' right to have *ex parte* discussions with the court, and the court had explicit authority, pursuant to the Agreed Order, to "instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report." Pet. App. I (G), at 4.

None of the courts that have considered the issue have disqualified a judge based on *ex parte* communications with an expert panel. In *United States v. Green*, 544 F.2d 138 (3d Cir. 1976), defendants challenged the court's impartiality because it had instructed its law clerks to observe an allegedly incompetent criminal defendant and the court had communicated *ex parte* with its Rule 706 expert to determine competency. At a post-trial hearing, the court revealed its conversations with the Rule 706 expert and the court's law clerks testified about their observations. While the Third Circuit cautioned generally against such communications, it affirmed the conviction.

In *Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp. 1231 (D.N.M. 1990), plaintiffs challenged the court's impartiality after it had several hours of *ex parte* communications with its Rule 706 expert and accompanied the expert on a tour of the facilities at issue. The court concluded that its impartiality in the case was not reasonably in doubt and denied a motion for recusal. In doing so, the court relied on the Sixth Circuit decision in *Bradley v. Milliken*, 620 F.2d 1143, 1157 (6th Cir.), *cert. denied*, 449 U.S. 870 (1980), which also held it was not

reversible error for a court to have *ex parte* discussions with court-appointed experts.

In this case, unlike in *Green* and *Milliken*, the parties *consented* and were continually aware that *ex parte* communications were taking place. This consent also disposes of the defendants' suggestion (Pet. 55) that the district court's *ex parte* communications with the Panel violated the Model Code of Judicial Conduct. The Model Code expressly recognizes that "a judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge." Model Code of Judicial Conduct, Canon 3(d). The provision does not deal with judicial contacts with third parties such as court-appointed experts for settlement or other purposes; however, it seems clear, based on practice and experience, that Canon 3 is not intended to preclude such discussions based on the parties' consent. In any event, Canon 3 expressly permits *ex parte* contracts for administrative purposes, and the court stated well before any recusal motion that its contacts with the Manager and the Panel were for administrative purposes. *E.g.*, Pet. App. II (K), at 12-13.

Contrary to the suggestion of defendants (Pet. 7), there is nothing in Rule 706 that proscribes *ex parte* contacts between the court and court-appointed witnesses. While Rule 706 requires the witnesses to be informed of their duties in writing or at a conference with the parties present, that requirement clearly was satisfied by the extensive Agreed Order and the numerous meetings of the parties, the experts, the Manager and the court which preceded its entry.

Rule 706 says not a word about how court-appointed experts are to conduct their investigation or how, during and after that investigation, they are to interact with the court that appointed them. The Rule protects the parties from abuses involving court-appointed witnesses by emphasizing that "nothing in this rule limits the parties in calling expert witnesses of their own selection"[22] and by guaranteeing that court-appointed witnesses "shall be subject to cross-examination by each party." Fed. R. Evid. 706. All parties in this case will have that opportunity in discovery and at trial. If defendants can show the panel is biased or its report is flawed, cross examination is the way to do so. But complaints about the experts, their communications, and methods are not a basis for recusal of the court.

D. The Petition Indicates No Personal Knowledge Of Disputed Evidentiary Facts On The Part Of the District Court.

In their Petition, defendants claim the district court should be recused pursuant to 28 U.S.C. § 455(b) because it has "personal knowledge of disputed evidentiary facts." Pet. 55. Though difficult to parse, the Petition appears to make reference to only two sources of facts in support of this claim: The September 7, 1994 meeting between the district court and the court-appointed experts and an unsolicited letter from a mental health

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[22] The Agreed Order goes further and provides that "no party shall be bound by any of the opinions contained in any report of the Panel." Pet. App. I (G), at 9.

advocacy group. Neither of these asserted contacts provides a basis for recusal.

1. The September 7, 1994 Meeting Was Not Extrajudicial and Gave the District Court No Personal Knowledge of Disputed Evidentiary Facts.

This Court has held that under Section 455(b), " '[p]ersonal' knowledge of evidentiary facts means 'extrajudicial.' " *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 991 F.2d 1249, 1255 (7th Cir. 1993). The Supreme Court reached a similar conclusion in *Liteky*, 114 S. Ct. at 1155. Under this formulation, "[f]acts learned by a judge in his or her judicial capacity cannot be the basis for disqualification." *Id.*; *accord Hillsberg*, 812 F.2d at 335, quoting *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

There can be no question that the district court's September 7, 1994 meeting with its expert panel and the Manager was in a judicial capacity. The parties were advised of the meeting and its agenda both before and after the meeting, and there is no evidence that the meeting strayed beyond its intended purpose of advising the court of the Panel's progress, outlining its plans, and "set[ting] a course of action for completing the final draft." Pet. App. IV (J).

In their Petition, defendants persistently chastise the court for "play[ing] an active role in preparing the panelists' opinions." Pet. 18. In fact, the only evidence adduced by the defendants shows that the district court merely

told the Panel and the Manager that whatever methodology was used, it would have to satisfy the requirements of *Daubert*. Pet. App. III (C), quoted in Pet. 18. This admonition was well within the court's "exclusive prerogative" under the Agreed Order "to instruct the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report." Pet. App. I (G), at 4.

The court quite properly instructed the panel to produce a report that would satisfy applicable legal standards and the terms of the Agreed Order.[23] But telling the Panel what it was supposed to do is a far cry from deciding whether they had done it. Indeed, as defendants recognize, Pet. 18, the district court repeatedly told the parties that they would have the opportunity to challenge the Panel's judgments and methodology under *Daubert* and otherwise and that the court had kept an open mind with respect to such challenges. *See* Pet. App. I (I), at 19; I (Q), at 15-24; II (E), at 35; II (K) at 21-26.

Even if the experts revealed their methodology and tentative substantive findings, such discussions did not provide the district court with "personal knowledge"

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[23] The Petition asserts that the experts attempted to persuade the court of the "superiority of their approach" to that of the accreditation process. Pet. 17. The outline for the meeting, however, states only that the experts discussed how their approach "differs" from accreditation (JCAHO). Pet. App. I (I). Discussion of such differences cannot have surprised defendants because the experts' views on this subject were disclosed many times to the parties, including in the experts' May 1993 memorandum prepared before their appointment. *See* Pet. App. III (K), Exh. 5, at 2.

about the experts' trial testimony. To the contrary, those findings had already been previewed to the parties. Pet. App. III (K), Exh. 16, at 1. They were subsequently discussed in draft with the parties and the court, finalized, filed with the court, discussed at length in settlement discussions and, ultimately published to the public at large. In short, a preview of the Report could not have provided the district court with any "personal knowledge."

2. The July 11, 1995 Letter from MHAI Was Not Extrajudicial and Gave the District Court No Personal Knowledge of Disputed Evidentiary Facts.

The second basis for defendants' demand for recusal under Section 455(b) is a letter written to the court by the Mental Health Association of Illinois (MHAI).[24] This letter was not before the court when it decided the recusal motion below and should not be considered here. In any event, it provides no basis for defendants' request for recusal by mandamus. The letter was received by the court in the performance of its duties and did not give the district court "personal knowledge of disputed evidentiary facts." Moreover, the court, on its own initiative, disclosed to the parties the substance of the letter and its response at the time in question. Pet. App. III (E), at 8-10.

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[24] Defendants' legal argument (Pet. 52) disingenuously refer to communications with advocacy groups and plaintiffs' counsel but cites no such communication other than the single letter from MHAI.

The MHAI letter consists of a series of general conclusory statements about documents and reports which were not provided to the district court. *See* Pet. App. IV (Q). These are not "evidentiary facts" like seeing the site of an accident, having personal knowledge of a transaction or participating in a seminar on key issues in a case. *See In re School Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992), a case heavily relied upon by defendants (Pet. 51-52), in which the recused judge had attended a "pro-plaintiff conference on a key merits issue . . . in the plaintiffs' case." *See also Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 41 & n.4 (4th Cir. 1995) (judge's participation in plaintiff bar's torts seminar was "almost certainly extrajudicial"). Here, to the contrary, defendants point to no conduct by the district court outside its judicial function.

More importantly, these kinds of unsolicited letters to judges in their official capacity do not constitute the kind of extra-judicial contacts that warrant recusal. *See United States v. Hillsberg*, 812 F.2d 328, 335 (7th Cir.) (letter received by judge from defendant's mother did not require recusal), cert.denied, 481 U.S. 1041 (1987); *In re Hipp, Inc.*, 5 F.3d 109, 117 (5th Cir. 1993) (*ex parte* receipt of letter about proceeding "could not reasonably support any inference of impartiality"). A contrary rule would require recusal every time a district court judge received an unsolicited letter, a scenario that could be orchestrated by a party any time it wanted a change of venue. This is not the rule, and such communications cannot be the basis for a motion for recusal.

E. Defendants Have Produced No Evidence That Judge Duff Is Personally Biased Or Prejudiced Toward Any Party.

As this Court has stressed, "[t]he disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence." *Balistrieri*, 779 F.2d at 1202. Moreover, "[t]he negative bias or prejudice from which the law of recusal protects a party must be grounded in some *personal* animus or malice." *Balistrieri*, 779 F.2d at 1201 (emphasis added). Defendants have not even approached this substantial burden.

Initially, defendants have not shown, nor even hinted, that the conduct of the district court to which they object was based on *any* (much less "personal") bias or prejudice. After all, even where relations between a judge and counsel are "strained" and the judge shows "[v]isible annoyance" with counsel, recusal is not warranted; otherwise, litigants unhappy with a judge's ruling would have a strategic incentive "to get under judges' skin." *National Union Fire*, 839 F.2d at 1232. Defendants ridicule the court for contrasting this case to situations involving bribes or other misconduct (Pet. 54), but in fact the defendants have failed to suggest any reason why the district court might be prejudiced against them, or what it might have to gain by undermining their case. *See Union Carbide*, 782 F.2d at 714 (denying recusal motion where a ruling by the judge in favor of either side "could not put a nickel in her pocket"). *See also Rafferty v. NYNEX Corp.*, 60 F.3d 844, 848 (D.C. Cir. 1995) (cannot "infer[] bias from unfavorable judicial rulings and from court delays in ruling on pending motions").

Carefully examined, the only factual bases for defendants' charge of actual bias against them are their assertions that the court has shielded the panelists from required disclosures to defendants and chastised defendants for their refusal to participate seriously in settlement discussions. Pet. 56-57. Neither of these charges supports defendants' demand for recusal.

The first charge about shielding the panelists is simply untrue. The court has, from the outset, complied with the Agreed Order by requiring the parties to supply to each other any information provided to the Panel. All materials in the possession of the Panel and Manager have been produced. *See* Pet. App. II (M), at 14-16. If a party could claim bias and seek recusal every time a judge disagreed with the timing or decision on a discovery motion, no judges would ever be permitted to supervise a case through trial.

Defendants' attack on the court's comments about the defendants' unconstructive approach to settlement discussions is similarly unpersuasive. The district court complained that representatives of the defendants who had been sent to settlement discussions had not been straightforward with him and had lacked settlement authority. Pet. 56, *quoting* Pet. App. II (M) at 25, and (W) at 90-91. The court accurately observed that the Governor and key legislators may be essential to the settlement of this case and implored them to participate. *E.g.*, Pet. App. I (I), at 57; (K), at 9. Again, this is not evidence of bias or improper conduct. It is evidence of a veteran judge attempting to bring the essential players into a room to talk about settlement after the parties had asked him to participate in the settlement process. As noted earlier,

those kinds of efforts and comments are not evidence of extrajudicial bias. *Liteky*, 114 S. Ct. at 1157.

Finally, defendants seem to claim that the court is biased because it has prejudged the Panel's Report. As noted earlier, this argument is belied by any fair reading of the record. For example, in their Petition, defendants argue that the court has improperly accepted the experts' Report as fact. Pet. 20, quoting Pet. App. I (I), at 4. In actuality, however, the quoted transcript passages refer to "*assertions* of fact," *id.* (emphasis added), emphasizing that the court has not decided whether or not they are true. As noted earlier, the court has repeatedly stated that it has not prejudged the report and that the parties are free to attack the experts' conclusions at trial.[25] *See, e.g.*, Pet. App. I (I), at 18, 28, 57; Pet. App. I (W), at 9. *See also Green*, 544 F.2d at 146 (*ex parte* telephone conversation with court-appointed expert did not constitute grounds for reversal where "full opportunity existed for cross-examination").

We recognize that there is a line of cases that creates a narrow exception to the extrajudicial source requirement "in the rarest circumstances" where the judge "displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 114 S. Ct. at 1157.

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[25] Defendants' only other "evidence" that the district court has prejudged the Panel's conclusions are two letters from the Panel thanking the people who had worked on it for their efforts. Pet. 29, *citing* Pet. App. IV (Y). It is ludicrous to contend that these letters by the experts complimenting the file reviewer on a job well done and copied to the court suggest bias by the judge.

The example most commonly cited is that of the judge who remarked that the hearts of German-Americans "are reeking with disloyalty." *See id.*; *Balistrieri*, 779 F.2d at 1201; *Berger v. United States*, 255 U.S. 22 (1921). This line of cases is wholly inapposite to the case at bar. Defendants have cited not a singe [sic] instance in which the district court has disparaged their honesty or integrity, much less an example of any deep-seated bias or antagonism against them.[26]

F. Unwarranted Recusal is Contrary to the Public Interest.

Where it is unsupported by evidence of bias, recusal is contrary to the public interest. Defendants wax eloquent in their Petition about the importance of public confidence in the judiciary. Plaintiffs obviously agree. But, as the cases point out, recusal is not designed as a tactical weapon. As the Eighth Circuit has explained:

> The recusal statute does not provide a vehicle for parties to shop among judges. Nor does [the statute] require recusal every time a judge comments a procedural error or departs from protocol in some way. If it did, it would be extremely difficult for any human being (a category that includes judges) to provide for the duration of a case as complex and protracted as this one.

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[26] There has been no indication by defendants that the Governor or defendant Patla have asked the district court to recuse itself in all cases in which they are parties. This would obviously be appropriate if defendants truly believed the Governor was biased against them.

In re Little Rock School Dist., 839 F.2d 1296, 1302 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988). Other Federal Courts have taken a similar approach:

> We subscribe to the view that motions to recuse should not "be viewed as an additional arrow in the quiver of advocates in the face of [anticipated] adverse rulings."

In re Kansas Public Employees Retirement System, 85 F.3d 1353, 1360 (8th Cir. 1996), *quoting TV Communications Network, Inc. v. ESPN, Inc.*, 767 F.2d 1077, 1081 (D. Colo. 1991).

For this reason, "[a] judge has a duty not to grant a motion for recusal where the facts show that a reasonable person would not question his impartiality." *Jewelry Repair Enters., Inc. v. E & S Assocs.*, 1996 WL 311462, at *4 (E.D Pa. June 4, 1996). *Accord Hodgson v. Liquor Salesmen's Union Local No. 2*, 444 F.2d 1344, 1348 (2d Cir. 1971) (court "is under just as much a duty to deny the application as he would be to recuse himself if it were sufficient"). One of the reasons federal judges are appointed for life is to help them withstand the kind of unsubstantiated public and judicial accusations that can be made by powerful public officials like the Governor and Director Patla who are defendants in litigation before them.

Given the lack of substantiation for defendants' allegations, the district court properly denied the motion for recusal. To permit defendants to get away with their naked tactical maneuver would only encourage others to substitute recusal motions for good faith litigation.

CONCLUSION

For the foregoing reasons, defendants' Petition for a Writ of Mandamus should be denied.

Respectfully submitted,

K. L., et al.

By: /s/ Steven R. Gilford
One of Their Attorneys

Dated: July 15, 1996

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

K.L., L.F., and R.B., on behalf of themselves and all persons similarly situated, Plaintiffs, vs. JIM EDGAR, Governor of the State of Illinois, and ANN PATLA, Director of the Illinois Department of Mental Health and Developmental Disabilities, Defendants.	No. 92 C 5722 Chicago, Illinois Wednesday, September 4, 1996 9:30 o'clock a.m.

REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES H. ALESIA

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[p. 3] THE CLERK: 92 C 5722. K.L., et al. versus Edgar.

MR. WOLF: Good morning, your Honor, Benjamin Wolf, Colleen Connell and Roger Pascal for the plaintiffs.

MR. CHEFITZ: Joel Chefitz and Timothy Patenode for the defendants.

MR. ROEDER: Good morning, your Honor, my name is Steven Roeder. I have filed an appearance before the Seventh Circuit on behalf of Judge Duff, and the Court asked that I attend today.

THE COURT: If you are wondering how I got this case. As you know, the Seventh Circuit issued a writ of mandamus and ordered Judge Duff removed from the case. Then by random selection, it was assigned by Judge Shadur who recused himself. At a meeting with the Executive Committee on August 20th; coincidentally, I happened to be there along with Judge Zagel. We are non-voting members of the Executive Committee until this month.

The Executive Committee voted to put this case back on the wheel, because you are going towards trial. The next day I discovered, by random selection, it was assigned to me.

I haven't discussed this case with Judge Duff, nor under the circumstances do I intend to.

I haven't gotten copies of the pleadings, but I have gone through the docket in this case. Does this case [p. 4] include all of the mental facilities in the State of Illinois, is that at issue, or just one or two, or what?

MR. WOLF: Your Honor, it includes them all at the present time. There is a pending motion to amend the complaint that would exclude one of them, the Chester Mental Health Center, which is a so-called forensic facility for people who come through the criminal justice

system, or are found not guilty by reason of insanity, or not fit to stand trial.

THE COURT: Is that being objected to?

MR. WOLF: That part of the amended complaint is not being objected to, as I understand it.

THE COURT: What else is in the amended complaint, it is as it is –

MR. WOLF: We also sought to exclude the child and adolescent facility, portions of the facility, and the forensic patients at other facilities. There are some forensic facilities that have both forensic patients and non-forensic patients. That portion, as I understand it, is also not objected to.

But there is a third portion of the motion to amend, which involves adding some language clarifying our factual allegations, and that is objected to.

THE COURT: Namely what, what is the language you say is clarifying?

[p. 5] MR. WOLF: We seek to assert that the defendants have a practice of discharging plaintiffs, many of whom are mentally incompetent, into dangerous facilities; sometimes discharging them into the streets with no follow-up services.

THE COURT: That is beyond the class certification, as I recall, is it not – it was in Judge Shadur's and Judge Duff's absence, I think, according to what I received from counsel – I don't know if you have a copy of this – by the way, I am not accepting any letters from

anybody, including lawyers, or any advocacy groups, or anything else.

Anything you have to say to me, it is in open court, on the record, and no ex-parte communications. If there is any advocacy group that you are aligned with, please inform them of that. If I do happen to get one, my secretary would be instructed to send it right back there and not even show it to me.

MR. PASCAL: May I ask if Your Honor has a policy on filings at 5:00 o'clock the night before a hearing, such as we got last night?

THE COURT: The pile that you are talking about, what I received, as far as I am concerned, I don't want to see anything from any lawyers unless it is done in open court and on the record. That is my policy. That also includes any advocacy group, or any litigants, or anything else.

If this involves all of the mental facilities [p. 6] in the State, why wasn't this case filed in Springfield originally. It seems that would be the most appropriate place.

MR. WOLF: Your Honor, the defendants are the Director of the Department of Mental Health and the Governor, who can be sued in this District as well.

THE COURT: I know he can be. I am talking about under 1404(a), they can also be sued and served in Springfield.

MR. WOLF: The facilities include many Chicago area facilities. In fact, the majority of the plaintiffs' class lives in the District. The majority, I would say, also of the factual issues for trial –

THE COURT: How long is this case going to take to try?

MR. WOLF: We believe it will be four to six weeks to try this case.

THE COURT: Four to six?

MR. WOLF: Yes.

THE COURT: Will the parties consent to having this tried by the Magistrate Judge?

MR. WOLF: Your Honor, we haven't had an opportunity to consider that request. We would have to talk about it. I don't know our position.

THE COURT: I have looked over the Seventh [p. 7] Circuit's opinion, and as far as I am concerned, Leona Bachrach, Martha Knisley, and Dr. Okin, the panel of expert witnesses that Judge Duff appointed, I am going to discharge them. I am going to bar them from testifying at the trial of this case. It seems to me the Seventh Circuit questioned their objectivity and their credibility, and they had become advocates rather than expert witnesses. So the three of them are no longer going to be in this case, nor is either side going to be allowed to call them as expert witnesses.

Also, the appointment of Norvall Morris, as manager of the panel, is going to be terminated. The appointment of Judith Cottle, his assistant manager, is also terminated.

Has the final pretrial order been filed in this case?

MR. WOLF: It has not, your Honor.

THE COURT: It is due in July – why wasn't it filed?

MR. WOLF: We submitted a draft to the defendants. There was an awkwardness which arose in May and June because of the motion to recuse, your Honor. Frankly, the parties had a number of issues between us. Judge Duff was put in a position where it was very difficult for him to resolve some of those issues. We did not complete the pretrial order.

THE COURT: This case, as I understand it, is a [p. 8] bench trial, is that correct?

MR. WOLF: That is correct.

THE COURT: Is there more than one count in the complaint, or is it strictly 1983, I assume?

MR. WOLF: It is 1983 on the 14th Amendment, Your Honor.

THE COURT: What I am going to do is to require the parties to file a final pretrial order. You say you served the plaintiff's version on the defendant already?

MR. WOLF: We did, your Honor. But may I be heard on that point?

THE COURT: Yes.

MR. WOLF: One of the things that the parties had agreed to early on was that we could call the Court's experts as witnesses. Judge Duff had made it clear that actually he was going to call the Court's experts.

THE COURT: Have you read the Seventh Circuit's opinion?

MR. WOLF: Yes, I have, your Honor. I am not disputing your interpretation that they are no longer Court's experts.

THE COURT: I am barring them from testifying period.

MR. WOLF: Because of that, your Honor, we need to bring in new experts and do some work.

[p. 9] THE COURT: I will give you an opportunity to do that.

With regard to the final pretrial order, I will ask you again. Has your version, with the exception now of expert witnesses, been served on the defendants?

MR. WOLF: Our version has been served, with the exception that you noted.

THE COURT: I assume then that you will want to serve an amendment, at least as to the expert witnesses, correct?

MR. WOLF: That is right, your Honor.

THE COURT: When can you have that done?

MR. WOLF: We have retained experts, and we believe it is going to take them 90 days to complete.

THE COURT: I am not going to hold this case up. This case is going to trial in short order. It doesn't take an expert 90 days.

MR. WOLF: Your Honor, may I be heard on that point?

THE COURT: Yes.

MR. WOLF: If our motion to amend the complaint is granted, there are still nine facilities at issue in this case, plus a number of policies that affect those facilities. The experts that I have retained as consultants already have received hundreds of pages of documents to review. They will [p. 10] have hundreds more to review. Then they will almost certainly have to come out here and interview patients and go through charts and look at those facilities, at least a significant number of them.

THE COURT: We are going to move this case towards trial and an early conclusion. A four- to six-week civil case is very difficult for me to fit in. I am going to have some time, so we are going to do it as soon as possible – by the way, this case was set for trial in front of Judge Duff a couple of times, was it not?

MR. WOLF: It was, Your Honor, and if the Court's experts had had their formal status, we were prepared to try this case. A significant part of this case is expert testimony about these institutions. We need a chance to prepare that expert testimony, and it takes time.

MR. PASCAL: If I understand your Honor's ruling, it also excludes, forgetting about their opinions, the work they did, and the interviews they did. If you are doing all of that, your Honor, we are starting from ground zero. There is no way – I think 90 days would be conservative for them to do all of the expert work that it took these experts two years to do, in a matter of a few weeks, and you are requiring us –

THE COURT: This case was filed in 1992, and from what I have received from counsel, the 5:00 missile that you [p. 11] are referring to, no discovery was done for three years.

MR. PASCAL: Because both parties engaged in settlement, your Honor.

MR. WOLF: We agreed, your Honor, that during the expert inquiry, which took a couple of years, we would stay discovery because we all intended to introduce their testimony at trial.

THE COURT: The Seventh Circuit changed that.

With regard to the pending motions, I have the docket sheet, and I want to go through these with you as to what motions are still viable.

First of all, there is a motion by the defendant, Edgar, for partial judgment on the pleadings. Is that still viable?

MR. WOLF: It is, your Honor.

THE COURT: Is it fully briefed?

MR. WOLF: Yes, sir.

THE COURT: What is the basis of that?

MR. CHEFITZ: Your Honor, we filed the motion contending that to the extent that the plaintiffs were seeking relief outside of the institution, and were complaining about conditions in the outside environment, not within the custody of the State institutions, it was beyond the scope of the 14th Amendment and Section 1983. It was clear that they were seeking that relief.

[p. 12] THE COURT: What is the motion to simplify the issues for trial?

MR. CHEFITZ: The same motion, your Honor. It is a motion with the title that is long. But what we wanted to do is to confirm that if we were going to trial, it would only be with respect to the nine hospitals run by the State of Illinois and the condition within those nine hospitals, and not the conditions in the outside environment.

THE COURT: I assume that is objected to, from what I have heard already?

MR. PASCAL: It is objected to among other reasons, your Honor, from the fact that the activity that counsel refers to happened at the very beginning of the hospitalization when they do a discharge plan. So, yes, it very much is.

THE COURT: That is part of that same motion that is fully briefed, is that right?

MR. CHEFITZ: Yes.

THE COURT: Then there is another motion by the defendant, McDonald, to set a schedule for the disclosure of fact witnesses.

MR. WOLF: Your Honor, my recollection is – I should let the defendant speak.

THE COURT: Is that still a viable motion, it is probably still on the docket?

[p. 13] MR. PATENODE: I believe that that one was resolved by agreement between the parties.

THE COURT: Then that motion will be stricken.

The next one is the motion to compel discovery. It was filed back in April. Is that disposed of?

MR. WOLF: Your Honor, we filed ten motions to compel discovery, all of which were granted in whole or in part by Judge Duff. I don't believe there are any pending.

THE COURT: That one is stricken, we can remove that from the docket.

The next one is the same.

Then there is a motion for leave to file instanter a reply memorandum in support of a motion for leave to file an amended complaint. That still appears on the docket. I assume that was granted?

MR. WOLF: It was, your Honor.

THE COURT: So that can be stricken as granted.

Then there is another motion of May 14th to compel discovery. I assume, from what you say, that was granted already?

MR. WOLF: To the best of my recollection, your Honor, all of the motions involving discovery were ruled on.

MR. PATENODE: Actually, we disagree with that characterization, Judge. There were some motions withdrawn, and some motions that were never ruled on.

[p. 14] THE COURT: I am asking you, what about May 14th, 1996?

MR. PATENODE: That was withdrawn, Judge.

THE COURT: It will be stricken from the docket then if it was withdrawn.

Then by the defendant, McDonald, a motion for leave to file excess pages, as far as briefing?

MR. PATENODE: That was granted.

THE COURT: That can be removed if that was granted.

Then the rest of them are by the defendant, McDonald, on discovery, on the possibility of recusal. A stay of proceedings, a protective order – another stay of proceedings, a continuance of the trial, for leave to file an emergency motion for an extension of time for the plaintiffs to respond to the defendant's motion for recusal.

Then there is an extension of time to respond to the defendant's motion for recusal. A reconsideration of the ruling on disclosure for ex-parte communications. Then for reconsideration of the plaintiff's motion to supplement the panel report. I assume all of those are stricken or been ruled on?

MR. PATENODE: I think at this point they are, Judge.

THE COURT: So we will strike all of those from the [p. 15] docket.

So from what you have told me, the only two that I have now that are in front of me are Governor Edgar's partial judgment on the pleadings motion and to simplify the issue at trial, which is actually one motion.

MR. WOLF: And the plaintiffs' motion for leave to amend, which is intertwined with our motion.

THE COURT: That doesn't even appear.

MR. CHEFITZ: Your Honor, just for clarification on the length of trial. The plaintiffs spoke for the defendants. If the issues remain as diffuse as they are right now, we think it will take at least that long, four to six weeks, for us to put our defense on.

THE COURT: I am under the Speedy Trial Act. That is why I mentioned with regard to having this case go to the Magistrate Judge. I have to know so I can schedule criminal cases around it. If you are telling me it is going to take six weeks for your case only –

MR. CHEFITZ: That's right.

THE COURT: I need the parties to tell me realistically how long this case is going to take.

MR. CHEFITZ: The other thing, your Honor, just for clarification. Jeff McDonald was a defendant in the beginning of the case, he is no longer a defendant. He was the Director of the Department of Mental Health, now Ann [p. 16] Patla is the Director of the Department, and she is the defendant, the named defendant in lieu of Jeff McDonald.

THE COURT: So those are the only two motions. That takes care of the motions.

By the way, I am going to need a copy of the complaint, copies of those two motions, the motion for partial judgment on the pleadings, and to simplify the issues at trial. The response to that motion, I guess, is one motion,

and also the reply. I want those delivered to my Minute Clerk this afternoon. I want a copy of the complaint delivered and the answer delivered, and anything you think of, that is any other pertinent pleadings that you think I should have in looking at this.

I don't intend to appoint anybody as an expert as far as the Court goes. I will hear the experts that both sides have. If the plaintiffs should prevail, however, I will probably appoint a Special Master. But that is if only the plaintiffs would prevail.

MR. ROEDER: Your Honor, I feel bound to advise the Court that we intend to file a petition for certiorari. Judge Duff will be back in town – he is out on vacation – we intend to file it a day or two after his return. Would your Honor like a courtesy copy of that petition as well?

THE COURT: It is really kind of ancillary to this. All I want to know, as it stands now, the mandate came down [p. 17] from the Seventh Circuit, so I do have jurisdiction as of today.

With regard to the petition for certiorari, that is something else.

By the way, have you told the defendants the identity and the names of the expert witnesses that you have retained?

MR. WOLF: At this point, we retained them, we thought they were consultants, your Honor, because the Court hadn't resolved the issue of the role of the former Court experts.

THE COURT: Now I have.

MR. WOLF: If they are testifying, we will certainly, pursuant to Rule 26, disclose their opinions and their identities.

THE COURT: The opinions, the curriculum vitae, and the identity. When is that going to be done?

MR. WOLF: Your Honor, I have scheduled a conference call with them next week. They are reviewing a mountain of paper that I sent them. Then we are going to talk about a proposed course of action for them to come here and study the Illinois Mental Health System and reach their conclusions. As I said, we can certainly reveal their curriculum vitae next week.

But as I said to the Court, it is going to [p. 18] take a few months for them to complete their study.

THE COURT: They are going to have to do it on an accelerated basis. I have some time now. I want to move this case along to resolution. This case has been set for trial a couple of times, and I intend to set it for trial as soon as possible.

MR. PASCAL: Is your Honor barring the basic work, the factual investigation that the Court-appointed experts did?

THE COURT: I am barring them from testifying as my experts. I am barring them from testifying, either in behalf of the defendant or the plaintiff. I am barring whatever they did.

MR. PASCAL: The only reason I asked that question is to make it clear. We are starting from scratch then with these witnesses.

THE COURT: You are starting from scratch.

MR. PASCAL: That's right.

THE COURT: If you read the Seventh Circuit's opinion –

MR. PASCAL: I did, sir. That is exactly why we are talking about time.

THE COURT: They questioned their objectivity.

MR. PASCAL: I am not questioning that, your Honor.

THE COURT: Also, since I have to make a [p. 19] credibility judgment on their testimony, they are barred.

MR. PASCAL: But the Seventh Circuit didn't say that we couldn't find experts that could start from scratch if they had to. That is all we are asking, to allow ourselves a reasonable period of time to do that.

THE COURT: I will give you that. But as far as I am concerned, that panel is flawed. Their conclusions are flawed, their underlying documentation is flawed, and they are no longer in this case for any reason.

MR. PASCAL: I raised it only because I think your Honor understands the task that lies ahead of us, if your Honor has made all of those rulings.

THE COURT: When can the plaintiffs' experts be disclosed, not only their curriculum vitae and their names, but also their opinions?

MR. WOLF: Your Honor, I don't know the answer to that until I speak to them next week. But I

believe, as I said to the Court, I believe the process of investigating will take them several months. It took the Court's experts more than a year previously. You have to go through several facilities. You have to interview probably quite a few patients, the staff, and look at dozen of documents, hundreds of documents, and get a feel for a very large system that is hundreds –

THE COURT: Then I will order the disclosure [p. 20] January 3rd. There is not going to be any extensions.

Now, with regard to the defendants' experts?

MR. CHEFITZ: We have already identified the defendants' experts, predicated on the plaintiffs' prior adoption of the panel's report. So obviously, what we would do is hope that we have the right to provide rebuttal opinions once we get these new opinions from the plaintiffs.

THE COURT: All right, then I will give you until March 3rd to disclose your witnesses, your expert witnesses, any new ones, let's put it that way. Their curriculum vitae and any opinions that they have, both of them in full compliance with Rule 26.

Now, as far as the final pretrial order. The plaintiffs' final pretrial order, the plaintiffs' version, will be due on March 24th. The final pretrial order in total will be due in open court on April 14th at 9:30, together with the proposed findings of fact, an original and two copies, as well as the trial briefs. At that time, I will set this case for trial, depending upon what my criminal schedule is. I will set a

status to see if the parties will consent to having this go to the Magistrate Judge.

MR. PASCAL: I think it makes sense. We should talk among ourselves.

MR. PATENODE: Judge, who would the Magistrate be, would it be the same who was assigned at the beginning of the [p. 21] case?

THE COURT: Yes, whoever was assigned to it. I have no idea.

Assuming the defense takes six weeks, how long is the plaintiffs' case going to take, six also?

MR. WOLF: No, we think our case will take about three to four weeks, your Honor.

THE COURT: So we are really talking about a ten-week trial, is that right?

MR. CHEFITZ: Does that include rebuttal?

THE COURT: Does that include rebuttal?

MR. WOLF: It doesn't, your Honor. I think we probably will have a week of rebuttal.

THE COURT: So we are up to 11 weeks. I am going to hold you to that.

Let's set a status – do you want to come back next week, and you can let me know about the Magistrate Judge?

MR. WOLF: That is fine with us, your Honor.

THE COURT: Let's make it September 11th, at 9:30.

Do you understand, with the consent of the parties, the Magistrate Judge has the same jurisdiction I do, and if you fill out the top half of the form only, any appeal can go directly to the Seventh Circuit.

MR. PATENODE: Judge, how should we transmit the [p. 22] materials that are requested from us this morning. Should we send them over to your Minute Clerk?

THE COURT: Just to my Minute Clerk, by messenger. So anything, the complaint, the two pending motions, and all of the briefs. The motion by the plaintiff to amend the complaint, the motion for judgment, and partial judgment of the pleadings, and to narrow the trial issues, and all of the briefs in support of both of those motions.

The complaint, the answer, and if there is anything else – you know the case far better than I – that you think is appropriate that I should look at, send that over too. I would like those sent over this afternoon to my Minute Clerk.

MR. WOLF: Your Honor, may I be heard on one point?

THE COURT: Yes.

MR. WOLF: You have had an opportunity to read the Court of Appeals' opinion of course, and the defendants' submission we received after 5:00 o'clock yesterday. We haven't had a chance to tell you our side of the story with respect to the Court's experts –

THE COURT: Now you have a chance.

MR. WOLF: Would you like to hear it now, your Honor?

THE COURT: Yes, because I am not going to take any more missiles from either side. Go ahead.

[p. 23] MR. WOLF: These people, as the Court of Appeals said, were mental health experts, they were not schooled in litigation, and they didn't know their appropriate role, nor were they expected to. If they were misled, Your Honor, I think it couldn't fairly be attributed to them.

What they did was, with the agreement of the parties, the parties agreed on these people after an extensive search. They spent more than a year studying the Illinois mental health system. They looked at each of the institutions. They studied thousands of pages of documents. They interviewed hundreds of people, including patients, staff, and others.

Many of their conclusions are in facts, or much of their testimony might be – we have never had a chance to talk to them in detail about this, and no one has taken their depositions. There might be things like admissions from the defendants, statements that the defendants made of a factual nature, as well as opinions and conclusions.

The Court of Appeals clearly said they couldn't testify as the Court's experts, but left to you the question of whether they can testify at all.

THE COURT: I have already ruled on that. As far as I am concerned, and I am passing on their credibility, they are tainted witnesses, both as Court experts

and as witnesses [p. 24] in this case. Now I think that is about the third time I have said it. That is my opinion. If Judge Duff is successful on his petition for certiorari and the case goes back to him, then he can undo everything that I have done today.

By the way, as far as that date for filing the final pretrial order, that also includes – I assume there is not going to be any more discovery other than the possibility of the witnesses, the expert witnesses. The rest of the discovery is over with, is that correct?

MR. WOLF: That is actually not true. We have about seven or eight depositions to complete, and three or four to take. To be honest, your Honor, things became something of a mess towards the end, with the recusal issues thrown in, and a very compressed discovery.

MR. PATENODE: Plus, Judge, we have some interrogatories that we feel that we need to have adequate answers from the plaintiffs on. We have some additional written discovery that we think we need to have responded to in order to focus on our trial preparation.

THE COURT: By the way, as far as any page limitations, if there are any other briefs that are filed, 15 pages is it. That is it. I don't want to see any single space, I don't want to see them out in the margins or anything else.

[p. 25] I have set the date for the filing of the final pretrial order in open court on April 14th at 9:30. I will set a discovery cutoff date. How much time do you need to complete discovery. When I say discovery, all discovery, including any expert witness depositions.

MR. WOLF: Your Honor, I think including the experts, we can complete discovery by the end of February. I think it is going to take that long with the experts.

THE COURT: Do you agree?

MR. WOLF: I'm sorry, your Honor, my co-counsel points out that the experts' rebuttal isn't even due until March 3rd. I guess it has to be later than that, I apologize.

THE COURT: Do you want me to pick a date, or do you want to pick a date?

MR. CHEFITZ: I assume it ought to be a date, your Honor, prior to the plaintiffs' pretrial submission. That will be the 24th of March. I would assume anytime shortly preceding that date.

MR. WOLF: Your Honor, we would ask for two weeks after we receive their rebuttal, which would be March 17th. We will have to depose their rebuttal experts.

THE COURT: So you are asking for a discovery cutoff of March 17th, is that what you are saying?

MR. WOLF: Within the schedule that the Court has [p. 26] set, that seems to us to be appropriate.

THE COURT: Then the discovery cutoff date will be March 17th. The date for the filing of the final pretrial order will be April 14th at 9:30 in open court. I will try and decide these motions as soon as possible.

MR. CHEFITZ: Thank you, your Honor.

MR. WOLF: Thank you.

I certify that the foregoing is a correct transcript of the original shorthand notes of proceedings in the above-entitled matter.

Anthony W. Lisanti
Official Court Reporter

Date

(2)

No. 96-844

Supreme Court, U.S.
FILED
DEC 31 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE BRIAN BARNETT DUFF, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

v.

JIM EDGAR, GOVERNOR OF THE STATE OF ILLINOIS, ANN PATLA, DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES and K.L., L.F. & R.B., on behalf of themselves and all persons similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

(1) Whether the district judge's petition to review the Seventh Circuit's disqualification order has been mooted by his subsequent retirement and the reassignment of his cases, so that a reversal of the disqualification would have no effect.

(2) Whether the Seventh Circuit correctly disqualified Petitioner under 28 U.S.C. § 455 where the would-be trier of fact in a bench trial (a) conducted private screenings of expert testimony in his chambers, preapproved the expert witnesses' methodology and received and responded to *ex parte* submissions on settlement strategies and the merits, all in violation of Federal Rule of Evidence 706, Canon 3A(4) of the Code of Conduct for United States Judges and his own agreed order appointing expert witnesses; (b) barred discovery into the substance of his *ex parte* communications; and (c) threatened retaliation against the Governor of Illinois in this and other cases.

(3) Whether the Seventh Circuit acted within its discretion in refusing the district judge a second extension of time to respond to a petition for writ of mandamus, especially when the Court of Appeals' expedited briefing schedule was dictated by an emergency of the district judge's own making.

STATEMENT OF CORPORATE RELATIONS

Respondents Jim Edgar, Governor of the State of Illinois, and Ann Patla, Director of the Department of Mental Health and Developmental Disabilities, are not corporations and thus have no parent corporations or subsidiaries.

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STATE RESPONDENTS' BRIEF IN OPPOSITION

Respondents Jim Edgar, Governor of the State of Illinois, and Ann Patla, Director of the Department of Mental Health and Developmental Disabilities, respectfully request that this Court deny the petition for writ of certiorari filed by the Honorable Brian Barnett Duff on October 15, 1996, and docketed on December 2, 1996.

JURISDICTION

The petition for writ of certiorari is without jurisdiction because it has been mooted by Petitioner's retirement and the reassignment of his cases, so that a reversal of his disqualification would have no effect.

STATUTORY AND OTHER PROVISIONS INVOLVED

In addition to the provisions cited by Petitioner, this case also involves Sections 371 and 372 of the Judicial Code, Federal Rule of Evidence 706(a) and Canon 3A(4) of the Code of Conduct for United States Judges.

Section 371 of the Judicial Code, 28 U.S.C. § 371, recites in pertinent part:

> **§ 371. Retirement on salary; retirement in senior status**
>
> . . .
>
> (b)(1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and

meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (f).

. . .

(c) The age and service requirements for retirement under this section are as follows:

Attained age:	Years of service:
65	15
66	14
67	13
68	12
69	11
70	10

. . .

(f)(1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:

. . .

(B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation under subparagraph (A), including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is

> assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.

Section 372 of the Judicial Code, 28 U.S.C. § 372, recites in pertinent part:

> **§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline**
>
> (a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

Federal Rule of Evidence 706(a) states in pertinent part:

> **Rule 706. Court Appointed Experts**
>
> **(a) Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the

clerk, or at a conference in which the parties shall have opportunity to participate. . . .

Canon 3 of the Code of Conduct for United States Judges states in pertinent part:

> **A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY**
>
> The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:
>
> **A. Adjudicative Responsibilities.**
>
> . . .
>
> (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

COUNTER-STATEMENT OF THE CASE

The United States Court of Appeals for the Seventh Circuit disqualified Petitioner based on extraordinary circumstances. Those extraordinary circum tances were established, not by representations of parties or their counsel, but by documents produced by a panel of court-appointed experts and by Petitioner's subsequent statements recorded in open court by his own court reporter. In addition to the one *ex parte*, off-the-record meeting with those witnesses acknowledged in the petition, those documents describe a series of such communications with the panelists—who were expected to testify at a bench trial before Petitioner—as well as *ex parte*, off-the-record communications with a plaintiffs' advocacy group and plaintiffs' counsel themselves. Those communications dealt with matters of substance, including the panelists' anticipated testimony at trial as well as strategies for using the press, public opinion and political leverage to pressure State officials into a settlement.

Respondents discovered these extraordinary facts on the eve of a scheduled trial because for the two previous years Petitioner prohibited any discovery into those *ex parte* communications. After partial disclosure was belatedly permitted, Petitioner forbade further inquiry, throwing a cloak of "judicial privilege" over his communications with the testifying experts. Petitioner displayed such extreme bias and prejudice toward Respondents that he threatened to retaliate against them in this and other cases. All these facts and more are noted in the Seventh Circuit's opinion. App. 29-42.

The Appointment of Rule 706 Experts

Because these Rule 706 witnesses were potential testifying witnesses and their testimony as "impartial" witnesses could be accorded great weight, a number of safeguards were built into the agreed order appointing them. First, the order was explicitly entered "pursuant to Rule 706 of the Federal Rules of Evidence." App. 48, 85. As the Court of Appeals observed, that rule ensures against *ex parte* communications between the district court and prospective witnesses.

> Rule 706(a) of the Federal Rules of Evidence specifies the right way [for a court to communicate with a Rule 706 witness]: "A witness so appointed [by the court] shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate." This places the substance of the instructions on the record and ensures that the parties know what is happening and can make appropriate suggestions, motions, and objections. The judge has not attempted to reconcile with Canon 3A(4) or Rule 706(a) the procedure he used in this case.

App. 33-34; *cf.* App. 87-88.[1]

Second, the panel was given a "manager," whose duties were stated in paragraph 3 of the order. Although

---

[1] Canon 3A(4) enjoins a district judge "except as authorized by law, neither [to] initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding."

the petition quotes from paragraph 3, it misses the point made by the Seventh Circuit:

> Paragraph 3(a) permits the Manager to "report to the Court and the parties," not to report to the judge in secret, and it does not even hint that the experts (who were likely to become witnesses) may meet privately with the judge. Paragraph 3(b), on which plaintiffs lay principal stress, states that the judge may direct the experts, but again it does not say or imply that the judge may receive information and deliver instructions in secret.

App. 33, 51; *cf.* App. 87-88.

Third, the agreed order provided that "any and all information provided to the panel, its consultants or the Manager shall be available to the parties' counsel on request." App. 52, 87. In this way, all parties could discover all information on which these testifying experts might base their opinions.

Petitioner's Ex Parte Communications

Despite the mandate of Rule 706, the Code of Conduct for United States Judges and his own agreed order, Petitioner proceeded to have several *ex parte*, off-the-record communications with the expert witnesses and others. As the Seventh Circuit found, those communications were "calculated, material and wholly unnecessary." App. 35.

The petition focuses almost exclusively on one *ex parte* meeting—held in chambers between Judge Duff and the panelists on September 7, 1994. In concluding that

Petitioner pre-screened and pre-approved the expert witnesses' methodology in that meeting, the Seventh Circuit relied on evidence from two of the participants: an agenda prepared and produced by panelist Dr. Robert Okin that later served as the draft outline for the final report,[2] and Judge Duff's own remarks in open court on the purpose of that meeting. App. 32, 99-104. The agenda demonstrated that the meeting addressed a highly important issue in this case: the methodology of the panel's report, which was "open to challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 . . . . " App. 36. "After defendants filed their motion for disqualification, the judge justified his meetings with the panel precisely on the ground that the meetings would enable him to ensure that the panel's report was admissible—that is to say, the judge offered as justification for an *ex parte* meeting the need to anticipate and preempt an important legal question." App. 36; *cf.* App. 101-04.[3] While the petition quotes Petitioner's attempted justification in a footnote, it misses the significance of his admission. Pet. 27 n.9.

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[2] This agenda was not obtained by Respondents until immediately before the filing of the motion to recuse. App. 30. Respondents did not consent to this meeting; indeed, they were not even aware of it until *after* it occurred. App. 99-100.

[3] The petition offers a conclusory affidavit from the panel's manager regarding this meeting, but the affidavit does not deny that the methodology of the panel's approach was discussed. Nor does it say exactly what was discussed. Pet. 8-9. The affidavit is phrased to allow the manager to distinguish between the methodology of the panel's report and its "substance."

The petition also disregards Petitioner's many other *ex parte* communications. Among them were:

- **Two July 1995 letters exchanged between Judge Duff and an advocacy group and counsel for plaintiffs.** As the Seventh Circuit noted, the advocacy group's letter asked "the judge to release the panel's report to the public so that it could be used in lobbying efforts. [The group] sent a copy of this letter to plaintiff's counsel, but not to defendants' counsel. After consulting the Manager, the judge replied with a letter that reads, in part: 'in due time, we hope we will achieve some significant results.' A reasonable observer would hear this as an assertion—long in advance of trial—that the state's institutions and programs violate the Constitution, and that a remedial order is forthcoming." App. 37-38; *cf.* App. 118-22.[4]

- **A December 7, 1995 letter from Dr. Okin to Judge Duff.** As the Seventh Circuit recounted, the letter was intended to discuss the timing of the release of the panel's report so that the "fight" could be "won on the street, not just in court." It further described a strategy to bring the Illinois legislature around to settlement, saying "How loudly they gnash their teeth is irrelevant. Whether they pay is the only relevant issue." App. 40-41; *cf.* App. 108-17.[5]

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[4] While the petition mentions this exchange in a footnote, it completely disregards both its *ex parte* character and the import of the trier of fact's response. Pet. 9 n.1.

[5] The Court of Appeals found the panel to have been "influenced by secret submissions from advocacy groups and counsel supporting plaintiffs in other litigation against Illinois."

The Seventh Circuit drew these examples from a number of improper communications depicting a pro-plaintiff strategic alliance that ultimately included Petitioner, *see* App. 99-135, yet the petition largely ignores the record.

Petitioner's Cover-Up

Although the agreed order required any and all information provided to the panel to be produced to the parties "on request," Judge Duff blocked defendants' requests for two years. The petition for writ of mandamus listed the many oral and written requests defendants made for this information and the three separate motions they presented thereafter. App. 136-41. Not until two months before trial did Petitioner relent and allow some of the data and information to be released, although he continued to prohibit disclosure of his *ex parte* communications with the panelists, which, as the Court of Appeals found, he alternately described as "administrative" and "social." App. 30, 139-40.

On May 29 and June 12, 1996, Respondents obtained a partial production of documents from the manager and the panelists, which included the agenda for the meeting of September 7, 1994, and the letter from Dr. Okin of December 7, 1995. App. 92. Respondents immediately

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App. 40; *cf.* App. 127-35. The petition entirely disregards this subject as well. The replacement judge has since discharged the panel and barred them from testifying in the underlying case. App. 231-33, 241-42. While the petition protests the Seventh Circuit's ruling on the panel and the replacement judge's conduct on remand, this only demonstrates Petitioner's improper personal stake in the case. Pet. 14-15.

served subpoenas on the panelists and other persons, but Petitioner quashed those subpoenas. App. 143. He then released to Respondents, for the first time, copies of the July 1995 letters he had exchanged with the plaintiffs' advocacy group and had provided contemporaneously to plaintiffs' counsel, but he again prohibited any further inquiry into his *ex parte* communications with prospective trial witnesses on the stated ground of "judicial privilege." App. 30, 96-97, 141-42.

Petitioner's Threats of Retaliation

As the Seventh Circuit noted, Judge Duff began to demand "significant concessions in settlement negotiations" from defendants, including the personal appearance of the Governor of Illinois.[6] App. 38-39. In demanding the Governor's appearance, Petitioner made remarks that, according to the Court of Appeals, could reasonably be read "as veiled threats to decide not only this case, but also other pending cases, against the State of Illinois as a penalty for the Governor's unwillingness to appear." App. 39. Petitioner went so far as to comment that "defendants would be in 'deep doo' if the motion for disqualification failed." *Id.*

Mootness and Subsequent Proceedings

The Seventh Circuit disqualified Petitioner on July 18, 1996. App. 29. On October 10, 1996, five days before

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[6] Those demands were directly prompted by, among other things, Dr. Okin's December 7, 1995, secret communication with Judge Duff. App. 108-17.

he filed this petition, Petitioner exchanged letters with the Chief Judge of the United States District Court for the Northern District of Illinois. Petitioner's letter states "I wish to retire from regular active service with the District Court pursuant to the provisions of 28 U.S.C. § 372(a)." Res. App. 1.[7] Section 372(a) allows a district judge "who becomes permanently disabled from performing his duties [to] retire from regular active service . . . . " Res. App. 1. Petitioner's letter further requests that all his cases be reassigned to other judges—unless all parties to a case consent to leave it with him—and that no new cases be assigned to him. Res. App. 1. Petitioner expresses his hope that, in the future upon the Chief Judge's request, he would be able to perform the duties set forth in 28 U.S.C. § 371(f)(1)(B). Res. App. 1. That subsection describes "substantial judicial duties not involving courtroom participation . . . , including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued and administrative duties for the court . . . . "

That same day, the Chief Judge wrote back that he "shall enter the orders as you have requested." Res. App. 3. Also that same day, the Executive Committee of the United States District Court for the Northern District of Illinois entered two orders, one providing that no new cases be assigned to Petitioner and the other reassigning his current cases, with certain exceptions. Res. App. 4, 5. The exceptions to reassignment were (a) "where all of the parties agree that the case should be reassigned to Judge

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[7] Citations to the materials in the appendix attached to this response are abbreviated "Res. App."

Duff"; and (b) "any civil case in which trial has been conducted by Judge Duff and is under advisement awaiting a final opinion from the Judge" or any criminal case with a comparable status. Res. App. 4.

In the meantime, this case has proceeded before the replacement judge. On September 4, 1996, the replacement judge set a schedule for submission of a final pretrial order in the case on April 14, 1997. App. 247. On December 18, 1996, at plaintiffs' request, this schedule was modified so that the final pretrial order is now due July 2, 1997. Res. App. 6.

REASONS FOR DENYING WRIT

The petition does not present any conflict with Supreme Court precedent; it does not present any conflict among the Circuits; and it does not involve any questions of public importance. Indeed, the petition was mooted before its filing by Petitioner's voluntary retirement and the reassignment of his pending cases. The petition thus serves no interest other than the personal stake that a judge has improperly taken in a case over which he can no longer preside in any event.

I. PETITIONER'S RETIREMENT AND THE REASSIGNMENT OF HIS PENDING CASES HAVE RENDERED HIS PETITION MOOT.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis,*

440 U.S. 625, 632 (1979). Indeed, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).

When changed conditions have mooted an issue on mandamus, this Court has refused to address the issue. For example, in *Schlagenhauf v. Holder*, 379 U.S. 104, 108 n. 3 (1964), this Court held a denial of mandamus to be moot after the district court corrected the alleged error. Similarly, in *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969), after the denial of a writ of mandamus, this Court held an issue of election law to be moot because the election had already been held. And in *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982), this Court held moot a claim to pretrial bail once the defendant was convicted, stating, "The question was no longer live because even a favorable decision on it would not have entitled [the defendant] to bail."

Likewise, Petitioner's own actions rendered this petition moot before it was filed. Petitioner has retired from regular active service on the ground of permanent disability under section 372(a) of the Judicial Code. Under the terms of the Executive Committee orders, this civil case could not have been retained by Judge Duff because (a) all parties do not consent; and (b) it is not fully tried and awaiting decision. Respondents are aware of no request by the Chief Judge that Petitioner perform section 371(f)(1)(B) duties. Even if there were such a request, those duties do not include the kind of active courtroom participation needed to try this case. In any event, section 371(b)(1) requires that, before the Chief Judge makes such

a request, Petitioner meet certain age and service requirements, which he will not meet until 1999 when he will be 69 years of age. The current schedule ordered by the replacement judge will take this case to trial well before then.

The petition is moot and should be denied for that reason alone.

II. PETITIONER'S DISQUALIFICATION NEITHER CONFLICTS WITH ANY DECISION OF THIS COURT OR OTHER CIRCUITS NOR RAISES A QUESTION OF PUBLIC IMPORTANCE.

Even if the issues raised by the petition were not moot, certiorari should still be denied. Though Petitioner challenges his disqualification under each of sections 455(a) and 455(b)(1), neither challenge demonstrates any conflict between the Seventh Circuit's decision in this case and the decision of this Court or any Circuit; nor does Petitioner demonstrate the existence of an issue of public importance.

Petitioner's principal argument is that the Seventh Circuit's decision conflicts with the majority opinion in *Liteky v. United States*, 510 U.S. 540 (1994). According to Petitioner, *Liteky* requires a finding that "fair judgment was impossible" before any disqualification under 28 U.S.C. § 455(a). Pet. 22.

The Seventh Circuit's opinion conflicts not at all with *Liteky* but with Petitioner's misunderstanding of *Liteky*. In *Liteky*, the district judge received all his information about the case in open court in the course of adversarial

proceedings. 510 U.S. at 542-43, 550-51. Since the "opinions formed by the judge [were] on the basis of facts introduced or events occurring in the course of the current proceedings," the majority required disqualification to be premised on the display of "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 555. But such a display is not required by *Liteky* when the district judge's remarks are "based upon extrajudicial knowledge or motives" or his disposition was "wrongful or inappropriate . . . because it rests upon knowledge that the subject ought not to possess . . . . " *Id.* at 545, 550.

The Seventh Circuit found this case to be the one anticipated by *Liteky* when the source of the trial judge's personal knowledge is "wrongful or inappropriate." In violation of Rule 706, the Code of Conduct for United States Judges and his own order appointing expert witnesses, Petitioner held *ex parte*, off-the-record communications with expert witnesses who were slated to testify on the merits of the case and then refused to allow inquiry into the contents of those communications. As the Seventh Circuit reasoned in following *Liteky*, "knowledge gained in a judicial capacity . . . enters the record and may be controverted or tested by the tools of the adversarial process. Knowledge received in other ways, which can neither be accurately stated nor fully tested, is 'extrajudicial.' " App. 34. No decision of this Court or any Circuit has found that a district judge can violate the rules of evidence and the judicial canons, privately communicate with testifying Rule 706 expert witnesses, refuse to disclose the contents of those communications

and then sit in judgment over those and other witnesses at trial. Such a procedure would smack of a show trial.

Nor is there any conflict between the Seventh Circuit's disqualification opinion and the decisions of other Circuits. For example, *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), a case cited by the Seventh Circuit but not even mentioned in the petition, the Third Circuit disqualified a judge who had "attended a predominantly pro-plaintiff conference on a key merits issue" and received a "Hollywood-style 'pre-screening' of the plaintiffs' case" from a collection of plaintiffs' experts. 977 F.2d at 782. After attending the conference, the district judge recognized that others might reasonably suspect his partiality and accordingly excluded the expert testimony of those who had participated in the conference. *Id.* at 783. But the court of appeals nonetheless disqualified him, stating that "we believe that a reasonable person might still suspect a prospective taint notwithstanding the district court's nonstatutory remedy." *Id.* That judge was disqualified even though he acted merely as a passive observer of expert testimony in a public forum; here, Petitioner took an active role in pre-approving expert witnesses' methodology during a private screening.

Petitioner's other main argument for certiorari is that the Seventh Circuit used a "new" definition of "personal knowledge" in disqualifying him under section 455(b)(1). Pet. 17. Not so. The Seventh Circuit's definition does not conflict with any decision of this Court. *Laird v. Tatum*, 409 U.S. 824 (1972), was decided before the 1974 amendments to section 455, and the issue in that case was whether a Supreme Court Justice had served as a "material witness" or had participated in the conduct of the

case, not whether he had "personal knowledge." Nor does the Seventh Circuit's definition conflict with that of any other Circuit. Neither *United States v. Evans*, 484 F.2d 1178 (2d Cir. 1973), nor *Schertz v. Waupaca County*, 875 F.2d 578 (7th Cir. 1989), defines "personal knowledge" under section 455(b)(1) or, indeed, even addresses the disqualification of a district judge.

At bottom, Petitioner's imagined conflict between the Seventh Circuit's opinion and either the decisions of other Circuits or the common practice of district courts is based entirely on his own confusion between testifying experts—such as in this case—and non-testifying experts or "technical advisers"—such as in the authorities cited in his petition. Pet. 17-20. When they deal with experts at all,[8] those authorities deal with non-testifying experts or technical advisers and with communications occurring after trial. *See United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 184 (2d Cir. 1991) (*ex parte* meetings with non-testifying housing advisor occurred post-judgment); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1231 (D.N.M. 1990) (*ex parte* phone conversations with non-testifying expert occurred after trial and were intended only to help the judge properly express opinions he had already reached).[9] The *Reference Manual on Scientific*

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[8] Two of his cases do not. *United States v. Phillips*, 664 F.2d 971, 1003 (5th Cir. 1981) (*ex parte* meetings with attorneys for one side); *Wolyn v. Livingston*, No. 93 Civ. 0618(TPG), 1995 WL 685971 (S.D.N.Y. Nov. 16, 1995) (*ex parte* conversations with court-appointed trustee).

[9] Further, in *Jackson*, the district judge did the opposite of what Judge Duff did; he offered to disclose all his notes and those of his clerks and allowed the adviser to be fully deposed on the communications. 757 F. Supp. at 1233, 1236-39.

Evidence, on which Petitioner also mistakenly relies, likewise pertains to technical advisors--not testifying experts. Pet. 19. The facts of this disqualification are so unusual that Petitioner cannot seriously liken his egregious conduct to the normal efforts of district courts "to foster settlement." Pet 20.[10]

III. PETITIONER'S PROCEDURAL ARGUMENT IS UNWORTHY OF REVIEW.

Petitioner's complaint that he was denied a "fair opportunity to be heard" by the Seventh Circuit, Pet. 25, cannot be squared with the facts and is not worthy of review. The Court of Appeals acted well within its discretion when it set a short response schedule on the petition for a writ of mandamus and when it ruled without oral argument and without receiving a brief from Judge Duff within the extended schedule. Not only was the Seventh Circuit's exercise of discretion warranted by the emergency created by Judge Duff, but the highly unusual circumstances in this case make it unlikely that this Court's review of that issue would provide any useful guidance to the Courts of Appeals for the future.

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[10] For example, local rules in the Northern District of Illinois provide that "[i]n a case where trial will be conducted without a jury, . . . the preferred method of having the court preside over settlement talks is for the assigned judge to arrange for another judge to preside or to refer the task to a magistrate judge." Rule 5.00 of the Local General Rules of the Northern District of Illinois (paragraph 5 of standing order establishing pre-trial procedure).

The petition for writ of mandamus was filed in the Seventh Circuit promptly on July 3, 1996, the same day Judge Duff released his decision denying defendants' motion for recusal. It was filed on the eve of trial because for two years Judge Duff had prevented defendants from obtaining the evidence that would confirm their suspicions. App. 30-31. On June 14, 1996, two days after being permitted to see but not copy evidence of the district judge's improprieties, defendants moved for immediate recusal or, in the alternative, for a stay and continuance of the trial, then set for July 15, 1996. App. at 92, 94. Judge Duff denied defendants' repeated requests for a continuance of trial with the disqualification motion pending, and he did not continue the trial until plaintiffs filed their own motion for continuance on July 2, 1996. App. 92, 98. Despite plaintiffs' request for a longer delay, the judge granted a continuance only until August 7, 1996. App. 92. Judge Duff otherwise rejected every request for a stay of proceedings, continued to rule on matters brought before him, including motions to compel, and expressed his intention to go to trial as scheduled. App. 92, 93-94, 98. It is truly ironic that the same judge now protests because the Seventh Circuit "could have allowed itself, the parties and the District Judge more time by granting Respondents' motion to stay the proceedings in the trial court," when he himself denied that motion more than once. Pet. 27.

Petitioner's citation to *In re Repetitive Stress Injury Litigation*, 35 F.3d 637 (2d Cir. 1994), is beside the point. In that case, the Second Circuit granted mandamus relief *sua sponte;* the district judge and the parties neither knew that

mandamus relief would be granted nor had any opportunity to oppose such relief. *Id.* at 639. In this case, in contrast, Petitioner not only had a "fair opportunity" to be heard but was actually heard on disqualification. After considering defendants' motion for recusal for three weeks, he issued a 23-page memorandum opinion. App. 1-23. "His position, stated at length . . . was fully considered by the panel." App. 41. In addition, the Seventh Circuit originally ordered "real-parties-in-interest" to respond by July 11. Pet. 11. It then extended the response date to July 15, allowing 12 calendar days in all for a response.[11] Pet. 11. The Court of Appeals noted "that the judicial respondent could have filed a response to the petition for mandamus on the same schedule as the private respondent, and did not do so." App. 41. Petitioner's claims of prejudice are unconvincing.

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[11] The petition before this Court complains that the mandamus petition and exhibits were left outside Judge Duff's office after business hours on July 3 and sat there for the weekend. Pet. at 11 n.2. But Petitioner neglects to mention that his clerk was notified of the filing during business hours and agreed to await delivery of the mandamus petition and all supporting papers, which was accomplished by 5:30 p.m., as agreed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 31, 1996

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Judge Brian Barnett Duff

Telephone
312-435-5541

October 10, 1996

Honorable Marvin E. Aspen
Chief United States District Judge
Room 2548

Dear Judge Aspen:

I have been informed by my physicians, whose certificates will be supplied, that I will be unable to perform my regular duties as a District Judge, including those set forth in 28 U.S.C. § 371(f)(1)(A). Accordingly, I wish to retire from regular active service with the District Court pursuant to the provisions of 28 U.S.C. § 372(a). Eventually, I hope to able, upon your request, to perform those duties set forth in 28 U.S.C. § 371(f)(1)(B).

During my period of disability, I request that I be relieved from assignment of any new civil or criminal cases, and that the current civil and criminal cases pending before me be reassigned, unless all parties in a particular case request the Chief Judge of the District Court that their case not be reassigned, and the Chief Judge, for such reason or otherwise, directs that such case or cases not be reassigned.

I stand prepared to complete such other formalities that are necessary to effectuate my request.

Sincerely,

/s/ Brian Barnett Duff

BBD:ss

(SEAL) UNITED STATES DISTRICT COURT
CHICAGO 60604

CHAMBERS OF
MARVIN E. ASPEN
CHIEF JUDGE

October 10, 1996

Honorable Brian Barnett Duff
United States District Judge
Room 2388

Dear Brian:

I received your letter with much regret and shall enter the orders as you have requested. You have served our Court with great diligence and dedication for which we are all grateful. Your warm friendship over the years has been especially appreciated. I wish you and your family well in the days to come and look forward to your continuing relationship with the Court.

Sincerely,

/s/ Marvin E. Aspen
Marvin E. Aspen

MEA:ss

United States District Court
Northern District of Illinois

ORDER OF THE EXECUTIVE COMMITTEE

IT IS HEREBY ORDERED That except as otherwise provided by this order all civil and criminal cases pending on the calendar of the Honorable Brian Barnett Duff be reassigned among the judges of this Court in proportion to their participation in the assignment of new cases. This order shall not apply to any civil case in which the trial has been conducted by Judge Duff and is under advisement awaiting a final opinion from the Judge. Nor shall it apply to any criminal case in which a defendant is currently awaiting sentencing by Judge Duff after the entry of a plea of guilty or after having been found guilty following trial.

IT IS FURTHER ORDERED That in any case reassigned pursuant to this order where all of the parties agree that the case should be reassigned to Judge Duff, a motion to reassign that case back to Judge Duff's calendar may be presented to the Chief Judge.

Enter:
For the Executive Committee

/s/ Marvin E. Aspen
Chief Judge

Dated at Chicago, Illinois, this 10th day of October 1996.

United States District Court
Northern District of Illinois

ORDER OF THE EXECUTIVE COMMITTEE

IT IS HEREBY ORDERED That no civil or criminal cases be assigned to the calendar of the Honorable Brian Barnett Duff. Whenever a card is turned bearing Judge Duff's name, it shall be passed and the next card turned. Whenever a case is filed that would be assigned directly to Judge Duff's calendar, it will be assigned by lot to the calendar of another judge.

IT IS FURTHER ORDERED That this order shall take effect on entry.

Enter:
For the Executive Committee

/s/ Marvin E. Aspen
Chief Judge

Dated at Chicago, Illinois, this 10th day of October 1996.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Joel Gerald Chefitz
Katten, Muchin & Zavis
525 West Monroe Street
Suite 1600
Chicago, Il 60661-3693

Case Number: 1:92-cv-05722

Title: K L v. Edgar

Assigned Judge: Honorable James H. Alesia

MINUTE ORDER of 12/18/96 by Hon. James H. Alesia: Granting motion for an extension of time to submit reports of their retained experts [284-1]. Plaintiffs are ordered to disclose expert witnesses in full compliance with FRCP 26 by 3/15/97. Defendants are ordered to disclose any expert witnesses in full compliance with FRCP 26 by 5/1/97. Discovery cut-off date is extended to 6/2/97, and date for submission of the final pretrial order in open court is reset to 9:30 a.m. on 7/2/97. Plaintiffs are ordered to submit their version of the final pretrial order to defendants by 6/18/97. These dates are final. Mailed notice

This docket entry was made by the Clerk on December 19, 1996

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated

by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

Supreme Court, U.S.
FILED
JAN 17 1997
CLERK

No. 96-844

In The

Supreme Court of the United States

October Term, 1996

THE HONORABLE BRIAN BARNETT DUFF, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS,

Petitioner,

v.

GOVERNOR OF THE STATE OF ILLINOIS, DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, and K.L., L.F. & R.B., on behalf of themselves and all persons similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondents' counterstatement of facts, including its contumelious allusions to "cover-up" and "improper personal stake," neither justify nor support the serious errors the Seventh Circuit committed in its opinion below. Worse, Respondents' contemptuous rhetoric represents a renewed effort to put the District Court on trial while it obfuscates the key legal questions before this Court. These include (1) resolution of the conflict between the decision below and *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147 (1994); (2) the need for clarity and certainty in the law pertaining to the obligations of a federal district court in communicating with court-appointed experts and in facilitating settlements; and (3) the right of a federal trial judge to be heard, on a petition for writ of mandamus, in accordance with the Federal Rules of Appellate Procedure.

I.

Furthering their attempt to derail consideration by this Court of questions of immense importance to bench, bar and litigants, Respondents put forth a mootness argument that has no factual merit, and scant apposite precedent in support.

First, Respondents intentionally misread the Petition as requesting that the underlying case in this matter be reassigned to Petitioner. While that *could* ultimately result from this Court's grant of *certiorari*, that is not the motivating reason why Judge Duff seeks to bring this case before this Court.

Along with more than one hundred Article III, bankruptcy and magistrate judges presently sitting in the Seventh Circuit, Judge Duff will continue, in the management of his cases,[1] to be constrained by the Seventh Circuit's novel and unprecedented definition of "personal knowledge" as used in 28 U.S.C. § 455(b)(1). Thus, he and these hundred other judges must avoid *any* discussion that "touch[es] the merits, or procedures affecting the merits" in *ex parte* conferences held with the consent of the parties, App. 31, lest they be disqualified from further hearing the case.[2] Moreover, the Petitioner, along with all other judges

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[1] Judge Duff's October 10, 1996 request to retire from regular active service for medical reasons, and for reassignment of certain cases, has not removed him from his position as an Article III judge. Indeed, Judge Duff continues to preside over cases, including one involving the State Respondents. *See Pearson v. Edgar*, 86 C 2181 (N.D. Ill.). Furthermore, the formalities associated with the District Court's request have not been completed. Finally, the October 10 orders do not affect or preclude reassignment of the matter underlying this appeal to Judge Duff. The underlying matter was reassigned to another judge on September 4, 1996, predating by more than one month Judge Duff's request and the subsequent reassignment orders of Chief Judge Aspen. The language of the October 10 orders provide no explicit bar whatsoever to reassignment of this matter back to Judge Duff.

[2] The opinion below re-writes Rule 5.00 of the Local General Rules of the Northern District of Illinois, by inserting the mandatory obligation to *require* "the court presid[ing] over settlement talks . . . to arrange for another judge to preside or to refer the task to a magistrate judge." *See* Resp. Br. at 19 n.10. In so doing, the Seventh Circuit appears to have circumvented General Rule 1.01, providing the judges of the Northern District with the authority to "promulgate its rules at their official meetings."

in the circuit, will be confronted in the future with "judge-shopping" disqualification motions for partiality, based upon the Seventh Circuit's rejection of the "fair judgment impossible" test of this Court's decision in *Liteky*. These prospects more than satisfy the requirement that the situation complained of is "capable of repetition, yet evading review," the standard first used in *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, 31 S. Ct. 279 (1911).

Second, grant of *certiorari* in this case offers Petitioner the requisite potential for effective relief: repair of the harm done to Judge Duff's judicial reputation by the conclusion of the Seventh Circuit panel, App. 31-34, that he had violated Canon 3A(4) of the Code of Conduct for United States Judges.[3] In *Johnson v. Board of County Commissioners for the County of Fremont*, 85 F.3d 489 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996), the Tenth Circuit rejected a similar mootness argument raised in an appeal by an attorney challenging his disqualification, an appeal brought after settlement of the underlying case. Citing federal authority from the Tenth and Eleventh circuits, the *Johnson* court held:

> These cases establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation. We therefore conclude

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[3] This injury is particularly egregious and unfair in light of the Seventh Circuit's refusal to permit Petitioner to be heard on the charges leveled against him by Respondents. *See* Pet. at 25-29.

> the appeal is not moot insofar as the district court's order found that Attorney Greer had violated the Colorado Rules of Professional Conduct.

Johnson, 85 F.3d at 492-93 (footnote omitted).

Finally, no prior decision of this Court on mootness has involved the challenge of a federal judge to the adoption by a court of appeals of rules on judicial conduct. The public importance of the rules promulgated in this case by the Seventh Circuit, and their future impact upon bench, bar and litigants alike, places this petition in a setting far more akin to that of class actions,[4] or that obtaining in *Southern Pacific Terminal Company*, than in any of the cases cited by Respondents.[5] Under these

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[4] For example, in *Gerstein v. Pugh*, 420 U.S. 103, 111, n.11, 95 S. Ct. 854, 861 n.11 (1975), this Court, in a class action context, rejected a mootness argument even where a decision by the Court would provide no effective relief to the name plaintiff, where a "constant existence of a class of persons suffering the deprivation is certain," thereby ensuring that there were clients with a "continuing live interest in the case." Based on cases like these, commentators have concluded that "courts have come to recognize that an individual plaintiff may continue to represent the interest of others even after any prospect of individual recovery has vanished." *See* Wright, Miller, & Cooper, *Federal Practice & Procedure* § 3533.9 at 391 (1984 & 1996 Supp.).

[5] In support of their mootness argument, Respondents rely upon *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964), stating that "this Court held a denial of mandamus to be moot after the district court corrected the alleged error." Resp. Br. at 14. That is not so; not only did this Court not hold the appeal to be moot, but granted *certiorari* to review the substantive issues raised by the appeal. In its decision, this Court mentioned mootness only in a footnote, and noted that the district court

circumstances, this Court's prior jurisprudence has been interpreted to have in essence "dispensed with the same-party requirement, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without reaching us." *Honig v. Doe*, 484 U.S. 305, 336-37, 108 S. Ct. 592, 611 (1988) (Scalia, J., dissenting) (discussing *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), *Doe v. Bolton*, 410 U.S. 179, 187, 93 S. Ct. 739, 745 (1973), *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 93 S. Ct. 1245, 1249 n.5 (1973), and *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972)) (emphasis in original).[6] Petitioner respectfully

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had corrected a minor issue while the petition for *certiorari* was pending.

Respondents' other citations fair no better, because the facts in those cases make the decisions totally inappropriate here. In *Brockington v. Rhodes*, 396 U.S. 41, 90 S. Ct. 206 (1969), this Court affirmed the Ohio Supreme Court's mootness determination since the petitioner's limited request for relief – placement of his name on an election ballot for a specific position on a specified date – was impossible because the specific election occurred. In *Murphy v. Hunt*, 455 U.S. 478, 102 S. Ct. 1181 (1982), this Court determined that petitioner Hunt would likely never be in a position to demand bail before trial (the substance of the appeal) because he was already subject to serving prison sentences on three different convictions.

[6] As recently followed by the majority in *Honig*, the "capable of repetition" standard is one that is applied flexibly, particularly in matters of public interest. In *Honig*, this Court held that an appeal involving whether or not a state or local school board could unilaterally remove a disabled child from the classroom for dangerous or disruptive conduct growing out of their disabilities (under the Education of the Handicapped Act (20 U.S.C. § 1400, *et seq.*)) was not moot despite the fact that the plaintiff was twenty years old and not enrolled in the

submits that the prudential bar of mootness has no place in this Court's consideration of this Petition.

II.

Respondents' personal attack on the trial judge, and their resolute dedication to the plea of mootness,[7] are but masks to cover their understandable inability to support, in any way, the Seventh Circuit's refusal to follow *Liteky*, and its unprecedented definition of "personal knowledge." Nor do Respondents confront the fact that the new Seventh Circuit rules will wreak havoc throughout the circuit and beyond in trial court attempts to settle cases. Indeed, Respondents' only counter is that Petitioner's "egregious conduct" cannot be likened to efforts to foster settlement. The importance of the questions raised by the

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California state school system. This Court, relying on a host of prior authority, concluded that there was a "reasonable expectation" that plaintiff may once again be part of the California school system and that "[u]nder these circumstances, we think it not only counterintuitive but also unreasonable to assume that respondent will forgo the exercise of a right that he has for so long sought to defend. Certainly we have as much reason to expect that respondent will re-enter the California school system as we had to assume that Jane Roe would again both have an unwanted pregnancy and wish to exercise her right to an abortion." 484 U.S. at 320, 108 S. Ct. at 602 (citing *Roe v. Wade*, 410 U.S. 113, 125, 93 S. Ct. 705, 713 (1973)).

[7] Respondents went so far as to raise their mootness argument in opposing Petitioner's motion to be relieved of the printing requirement (and costs) of Supreme Court Rule 33.2 in filing this Petition.

published Seventh Circuit opinion should not be summarily dismissed by reference to alleged "egregious conduct."[8]

Although recognizing, as they must, that the Seventh Circuit disqualified Petitioner on the alternate ground of partiality under § 455(a), App. 35-39, Respondents' only effort to defend the Seventh Circuit's ruling on that issue is a false and hollow proclamation of "Petitioner's misunderstanding of *Liteky*." Resp. Br. at 15. This strange piece of rhetoric is then followed, not by any explanation of Petitioner's "misunderstanding," but by the observation that the "fair judgment impossible test" does not apply to disqualification under the "personal knowledge" provision of § 455(b)(1). *Id.* Neither the majority opinion in *Liteky*, nor this Petition, holds that it does. Respondents' strawman, moreover, would hide the failure to discuss or reconcile the decision below on partiality under § 455(a), with the cases cited by Petitioner from the Second, Third, Fifth, Ninth, Tenth and Federal Circuits. *See* Pet. at 23. All of these follow the majority opinion in *Liteky* and apply the "impossibility of fair judgment" standard to disqualifications motions filed pursuant to § 455(a).

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[8] Similarly unbecoming and ineffectual is Respondents' argument, Resp. Br. at 19-21, that Petitioner is "unworthy" of the rights afforded him and other district court judges by the Federal Rules of Appellate Procedure that apply to mandamus petitions. In that context, Petitioner notes that regardless of Respondents' alleged conversation with Petitioner's clerk regarding service of Respondents' papers, Resp. Br. at 21 n.11, Respondents falsely attested in their certificate of service that they executed personal service on Petitioner.

With respect to the "personal knowledge" provision of § 455(b)(1), Respondents would distinguish the case law cited by Petitioner, Resp. Br. at 18, on the ground that those cases involve "non-testifying" experts, without explaining why that makes any difference. The restrictions the opinion below imposes on a district court's interaction with experts it appoints pursuant to Rule 706 make no distinction between testifying and non-testifying experts and, of course, neither does Rule 706. Moreover, the experts that are discussed in *United States v. Yonkers Board of Education*, 946 F.2d 180, 184 (2d Cir. 1991) and *Jackson v. Fort Stanton Hospital & Training School*, 757 F. Supp. 1231 (D.N.M. 1990), and in the *Reference Manual on Scientific Evidence*, *see* Pet. at 16-19, are experts appointed pursuant to Rule 706. As has been pointed out, these authorities are in direct conflict with the Seventh Circuit decision in the matter at bar.

CONCLUSION

For all these reasons, the Petition for Writ of Certiorari should be granted.

Dated: Chicago, Illinois
January 16, 1997

Respectfully submitted,

The Honorable Brian Barnett Duff

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